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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 70-69

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF APPELLANT

JOHN McQUISTON, Jr.
Gardiner, Oliver, Kennedy & McQuiston,
1400 Commerce Title Building,
Memphis, Tennessee 38103,
Attorneys for Appellant.

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Cases Cited

Addyston Pipe & Steel Co. v. United States,
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Allenberg Cotton Company, Inc., v. Coleman,
369 F. Supp. 426 (N.D. Miss. 1974) 24, 34, 39, 53
Bantam Books, Inc. v. Sullivan,
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Bibb v. Navajo Freight Lines, Inc.,
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Brinkerhoff-Faris Trust & Savings Co.,
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Bruhn's Freezer Meats v. USDA,
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Coe v. Errol,
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Cone Mills Corporation v. Hurdle,
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Cooney v. Mountain States Tel. & Tel. Co.,
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Dahnke-Walker Milling Co. v. Bondurant,
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Eli Lilly & Company v. Sav-on-Drugs, Inc.,
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Erie Railroad v. Tompkins,
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Evans v. Newton,
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Flanagan v. Federal Coal Company,
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Flood v. Kuhn,
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Furst v. Brewster,
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Gibbons v. Ogden,
9 Wheat 1 (1824) 79
Girand v. Kimbell Milling Co.,
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Herb v. Pitcairn,
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H. P. Hood & Sons v. DuMond,
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H. P. Hood & Sons v. United States,
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International Harvester Co. v. Kentucky,
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International Textbook Co. v. Pigg,
217 U.S. 91 (1909) 42, 67

Kosydar v. National Cash Register Co.,
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Leloup v. Port of Mobile,
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Lemke v. Farmer's Grain Co.,
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Longest v. Langsford,
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Manhattan Life Insurance Co. v. Cohen,
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Missouri ex rel Missouri Insurance Co. v. Gehner,
281 U.S. 313 (1930) 40, 61
Murdock v. City of Memphis,
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New York ex rel. Bryant v. Zimmeraman,
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Parker v. Brown,
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Parker v. Lin-Co. Producing Co.,
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Perkins v. Benguet Consolidated Mining Company,
342 U.S. 437 (1952) 56
Pike v. Bruce Church,
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Poe v. Ullman,
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Prudential Insurance v. Benjamin,
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Raley v. Ohio,
360 U.S. 423 (1959) 39, 52
Robbins v. Shelby County Taxing District,
120 U.S. 489 (1887) 42, 70
Saunders v. Shaw,
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Shafer v. Farmer's Grain Company,
268 U.S. 187 (1925) 42, 70, 75
Sioux Remedy Co. v. Cope,
235 U.S. 197 (1914) 42, 69
Smith v. Kansas City Title & Trust Co.,
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Southern Pacific Co. v. Arizona,
325 U.S. 761 (1945) 82
Sprout v. South Bend,
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Stafford v. Wallace,
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Standard Oil Company v. Johnson,
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State Board of Insurance v. Todd Shipyards Corp.,
370 U.S. 451 (1962) 43, 82, 88
State Tax Commission v. Van Cott,
306 U.S. 511 (1939) 40, 54
Swift & Co. v. United States,
196 U.S. 375 (1905) 42, 70, 93
Toolson v. New York Yankees, Inc.,
346 U.S. 356 (1953) 89
Union Brokerage Co. v. Jensen,
322 U.S. 202 (1944) 52, 102
United Public Workers v. Mitchell,
330 U.S. 75 (1947) 40, 61
United States v. Butler,
279 U.S. 1 (1936) 80

United States v. E. C. Knight Co.,
156 U.S. 1 69
United States v. Penn-Olin Chemical Co.,
378 U.S. 158 (1964) 45, 96
United States v. Rock Royal Co-operative, Inc.,
307 U.S. 533 (1939) 43, 70
United States v. South-Eastern Underwriters,
322 U.S. 533 (1944) 88
Western Union Tel. Co. v. Kansas,
216 U.S. 1 69
Whitney v. California,
274 U.S. 357 (1926) 38. 48
Wickard v. Fillburn,
317 U.S. 111 (1942) 79, 93
Woods v. Interstate Realty Co.,
337 U.S. 535 (1949) 46, 65

Statutes Cited

Mississippi Code 1942 Annotated (Supp. 1973):
§ 5309-239 ..... 2, 35
§ 5309-221 ..... 3, 35, 52
§ 5309-312 ..... 5, 53

United States Code
7 U.S.C. § 1 et seq. 14, 28, 84
7 U.S.C. § 2101 ..... 43, 87

Constitution Cited

United States Constitution, Article I, Section 8 35

Texts Cited

Cox A. B., Cotton, Supply, Demand & Merchandising 9, 71, 96
C.T. Corporation, What Constitutes Doing Business (1973) 105

Davis and Goldberg, A Concept of Agribusiness (Harvard University Press, 1957) 31
Dummerier & Heflebower, Economics with Application to Agriculture (McGraw-Hill, 1934) 15
Farm Quarterly, The, "Why Farmers Are Bullish for 72" (Feb. 1972) 22
Foreign Corporations, State Boundaries for National Business, 59 Yale L. J. 737 (1959). 45, 100
Frankfurter, The Commerce Clause Under Marshall, Tainey & White (1937) 82
Garside, A. H., Cotton Goes to Market (Frederick Stokes Co., New York, 1935) 12
Greene, Hybrid State Law in the Federal Courts, 83 Harv. L. Rev. 289 (1969) 38, 48, 58
Hathaway, D. E., Government and Agriculture (MacMillan Company, N.Y., 1963) 20
Koenig, Federal and State Cooperation Under the Constitution, 36 Mich. L. Rev. 752 (1938). 55
Miller, T. S., The American Cotton System (Austin, Tex. 1909) 12
Model Business Corporation Act Annotated (2nd Ed. 1971) 39, 53, 83
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland Ed. 1951) 40, 54
Stern & Gressman, Supreme Court Practice (4th Ed. 1969) 38, 48
Small Business Problems Involved in the Marketing of Grain and Other Commodities, Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, 93rd Cong., 2d Sess. (House Report No. 93-963, April 1, 1974) 28, 94

U. S. Department of Agriculture, Cotton Situation, CS-253 (October 1971, August 1973, November 1973, April 1974) 22
U. S. Department of Agriculture, Crop Report, August 1973 22
U. S. Department of Agriculture, Supp. for 1972 to Bulletin No. 417—Statistics on Cotton and Related Data 1930-1967 ..... 7, 24
Whyte, Business Associations, 1938 Wis. L. Rev. 52, 54 101
Wilcox and Cochrane, Economics of American Agriculture (Prentice-Hall 2nd Ed. 1960) 30
Wolfson & Kurland, Certificates by State Courts of the Existence of a Federal Question, 63 Harv. L. Rev. 111 (1960) 51

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

v.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT HAS JURISDICTION OVER A FEDERAL QUESTION:

A. WHERE THE STATE SUPREME COURT HAS CERTIFIED THAT IT NECESSARILY DECIDED THE FEDERAL QUESTION;

B. WHERE A STATE STATUTE INCORPORATES THE CONSTITUTIONAL EXEMPTION, AND THE QUESTION OF APPLICATION OF THE EXEMPTION WAS DECIDED BY THE STATE SUPREME COURT;

C. WHERE A CHALLENGE TO STATE INTERFERENCE WITH CONSTITUTIONAL RIGHTS IS ASSERTED IN A PETITION FOR REHEARING, AND SUCH PETITION PRESENTED THE FIRST OPPORTUNITY FOR THAT CHALLENGE AFTER ACTUAL INTERFERENCE WITH SUCH RIGHTS.

II. WHETHER MISSISSIPPI'S REFUSAL TO ALLOW A FOREIGN CORPORATION TO ENFORCE ITS CONTRACT WITH A MISSISSIPPI RESIDENT FOR THE PURCHASE OF COTTON TO BE SHIPPED FROM THE STATE IS REPUGNANT TO THE COMMERCE CLAUSE.

STATUTES CONSIDERED

Mississippi Code 1942 Annotated §5309-239 (Supp. 1972):

§5309-239. ***Transacting business without certificate of authority.***

No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any court of this state. Nor shall any action, suit or proceeding be maintained in any court of this state by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this state.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such

corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this state.

A foreign corporation which transacts business in this state without a certificate of authority shall be liable to this state, for the years or parts thereof during which it transacted business in this state without a certificate of authority, in an amount equal to all fees which would have been imposed by this Act upon such corporation had it duly applied for and received a certificate of authority to transact business in this state as required by this Act and thereafter filed all reports required by this Act, plus all penalties imposed by this Act for failure to pay such fees. The Attorney General shall bring proceedings to recover all amounts due this state under the provisions of this section.

Mississippi Code 1942 Annotated §5309-221 (Supp. 1972):

§5309-221. ***Admission of foreign corporation.***

No foreign business corporation for profit shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the Secretary of State. No foreign corporation shall be entitled to procure a certificate of authority under this Act to transact in this state any business which a corporation organized under this Act is not permitted to transact. A foreign business corporation for profit shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state, and nothing in this Act contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation. No foreign

non-profit non-share or non-profit or non-share corporation shall be entitled to procure a certificate of authority under this Act.

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities:

(a) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(b) Maintaining bank accounts.

(c) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(d) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.

(e) Transacting any business in interstate commerce.

(f) Conducting an isolated transaction completed within a period of thirty (30) days and not in the course of a number of repeated transactions of like nature.

(g) Investing in or acquiring, in transactions outside of Mississippi, royalties and other non-operating mineral interests, and the execution of division orders, contracts of sale and other instruments incidental to the ownership of such non-operating mineral interests.

Mississippi Code 1942 Annotated §5309-312 (Supp. 1972):

§5309-312. ***Application to foreign and interstate commerce.***

The provisions of this Act shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States.

STATEMENT OF THE CASE

A. The Contract Between the Parties

Prior to the cotton crop year 1971, Appellant, Allenberg Cotton Company, Inc., a Tennessee corporation, based in Memphis, Tennessee, arranged with one Covington, an independent cotton broker[1] located in Marks, Mississippi, to solicit offers for the sale of cotton from cotton farmers in the area around Marks (A.49, 66). Covington had 30 years' experience as a broker and as a buyer and seller of cotton (A.60). Covington had performed this service for other cotton merchants[2] and mills in past years, and he performed this service for other merchants and mills in 1972. In 1971 Covington, for reasons of his own, performed brokerage service only for Allenberg, although he was not restricted to Allenberg by any agreement (A.50, 52, 69). Covington was a part-time broker; he also bought and sold cotton for his own account (A.60). Under his arrangement with Allenberg, Covington would discuss with a local farmer the number of acres of cotton the farmer

[1] As used herein a cotton "broker" is a middleman who arranges a sale between the parties for a commission without taking title to the cotton.

[2] As used herein a "merchant" is one who buys and sells cotton for a profit.

might be willing to sell, the price at which he would be willing to sell, and the gin to be used (A.54, 55). After receiving an offer, Covington would telephone the Allenberg office in Memphis, Tennessee, and tender the farmer's offer to sell (A.54). Covington had no authority to enter into a crop purchase contract (A.60-61, 65, 66). Covington received a commission of from 50¢ to $1.25 per bale for his brokerage services (A.53). Sometimes this was paid by the farmer and sometimes by Allenberg (A.53). If the Allenberg office in Memphis accepted the farmer's offer to sell a bargain was struck at that time (A.103). Then the terms would be reduced to writing in a contract prepared and signed in Memphis by Allenberg, which was mailed to Covington, who would then have the farmer sign the contract (A.62, 63, 73). Allenberg also purchased cotton throughout the Cotton Belt, including Mississippi, Arkansas, Missouri, Tennessee, Louisiana, California, Arizona and Texas (R.70-78). Allenberg sold and shipped cotton throughout the world to its mill customers, most of which were located in Alabama, Georgia, North and South Carolina, Europe and Asia (A.93).

The contract between Appellant-Allenberg and Appellee-Pittman which is the subject matter of this suit, was established in the normal manner, which is described above, except that instead of being mailed to Covington (the broker), it, and several others, were delivered by hand by an employee of Allenberg who drove from Allenberg's Memphis office to Covington's office in Marks, Mississippi (A.57). Pittman was aware that he was contracting with Allenberg Cotton Company, Inc. of Memphis, Tennessee (A.82-83, A.5-6).

In January 1971 Ben E. Pittman approached Covington and asked if he could obtain a price of 22¢ per pound for his cotton (A.101-103). As a result of inquiries made to

Allenberg by Covington, an agreement was reached (A.103). The Pittman contract was executed January 28, 1971 (A.7, 8). At that time no cotton had been planted by Pittman. The contract required Pittman to have his cotton stored in a cotton compress and warehouse after it was harvested and ginned (A.7, 8). Samples of the bales of cotton were to be sent by Pittman to the U. S. Department of Agriculture for classification, and to Allenberg at its office in Memphis (A.7, 8). To obtain payment for the cotton Pittman was to deliver the U.S.D.A. classification cards and the warehouse receipts to Allenberg or Covington (A.7, 8). Pittman paid for compressing the cotton, and for storage fees until he delivered the warehouse receipts (A.7, A.68). Memphis Cotton Exchange Rules governed the contract (A.7, 8).

The cotton bought by Allenberg in Mississippi, including Pittman's cotton, was all purchased for shipment outside Mississippi (A.60, 78, 79, 96). In 1971 much of the cotton from the farming area around Marks, Mississippi, (where Pittman's farm was located) was shipped to Japan (A.60). The Pittman cotton was to be temporarily stored at a Mississippi warehouse designated in the contract pending its shipment to a customer of Allenberg outside of Mississippi (R.60, 78, 93, 96). *All* of the cotton purchased by Allenberg in Mississippi was shipped by interstate carrier outside the state of Mississippi[3] (A.106). At the time of the Pittman purchase, Allenberg was already obligated to customers outside the state of Mississippi to sell them cotton (A.93). The Pittman cotton was purchased for the purpose of satisfying part

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[3] Virtually all of the 1,693,000 bales of cotton grown in Mississippi in 1971 were shipped out of the state because there is no significant amount of cotton used by mills in Mississippi. U.S. Department of Agriculture, **Supp. for 1972 to Bulletin No. 417-Statistics on Cotton and Related Data 1930-1967**, pp. 58 and 77.

of this obligation (A.79). Pittman knew with whom he was contracting (A.5, A.83), and never denied knowing that the cotton would be shipped from the state (A.82-86).

The Pittman contract was entered in January, 1971, but by the time for delivery of the cotton to Allenberg in November, 1971, the market price of the cotton was $18,156.00 more than the contract price, and Pittman refused to deliver the cotton to Allenberg (A.118).

Allenberg sued in the Chancery Court of Quitman County, Mississippi, to enforce its rights under the contract. The Chancery Court found a breach of contract by Pittman and awarded damages to Allenberg of $18,156.00 and costs (A.132). On direct appeal to the Supreme Court of Mississippi, that court reversed and dismissed the case, holding that Allenberg was a foreign corporation transacting business within Mississippi without a certificate of authority, and that Miss. Code 1942 Ann. Sect. 5309-239 (Supp. 1972) barred Allenberg from maintaining suit in the courts of Mississippi.

B. Industry Context

The industry context of this case is explained in the following materials, which are included to show the economic functions performed by a cotton merchant such as Allenberg in participating in and creating markets for cotton in the United States and elsewhere in the world, as well as to explain the effect of certain federal programs on the marketing of cotton in the United States.

One of the primary functions of the cotton merchant is to assemble from all parts of the United States Cotton Belt and elsewhere in the world quantities of like kind, called "even-running cotton":

"Each of the thousands of mills [consuming or fabricating] cotton throughout the world specializes by necessity in a narrow range of products, and each requires specific qualities of 'even-running' cotton for efficient operation.

"Raw cotton is produced on millions of farms; and on most of these farms ***each bale is of a different quality*** due to variations in soil, time of planting, harvesting, changes in weather, variety of cotton planted, and many other causes. A vital function then of cotton merchandisers is to assemble these odd-lot bales and pool them with other bales of like qualities to make up "even-running" lots to meet the requirements of spinners wherever they are. Strange as it may seem, three or four bales grown by any one farmer may need to be, and sometimes are, actually sent to different parts of the world in order that each bale may find its best market and most efficient use. It is thus quite possible that a bale of cotton grown near a cotton mill in Texas will find its most economical use in a mill deep in France, or even a mill on the banks of the Ganges River in India alongside another cotton field; and a bale grown in India, because of its wooly nature, may be sent to the United States to be mixed with wool in making blankets and rugs."[4]

"Every cotton spinning mill is equipped to [operate on] a specific quality of cotton . . . A mill equipped to balance on Strict Middling cotton would not clean Strict Low Middling fast enough to keep the second set of equipment busy. Moreover, rolls set to draw 7/8 inch cotton could not handle 1-1/16 inch without substantial

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[4] A.B. Cox, **Cotton-Demand, Supply & Merchandising** (Hemphill, Austin, Texas 1953), pp. 4-5 (emphasis added). A.B. Cox was professor of cotton marketing at the University of Texas at the time this text was written and had been since 1926.

adjustments. These facts alone justify the spinning mill's insistence on delivery of the exact quality of cotton it buys."[5]

"Reasons for mill insistence on uniformity of staple length in cotton are made manifest at this point in the manufacturing process. If some of the cotton is long staple and some short and the mill operator sets his rolls to clear the long fibers, the short ones are not drawn and tend to fall down between the rolls and cause much waste. If the rolls are spaced for the short fibers, the long ones are caught by two pairs of rollers and are stretched or broken; the result is ragged, buckled yarn. In no case is it possible to make smooth yarn economically with such staple mixtures."[6]

Because of the needs of the textile industry as described above, cotton bought in various places of the world is grouped together by merchants, such as Allenberg, into even-running lots for delivery to the mills that are its customers. This grouping is done by the merchant's experts based on the government classification of the cotton, and based on the samples delivered to a merchant's home office.

"The commodity traded in spinners' markets is not just cotton. It is *even-running when qualities that are measurable are alike in each bale*: the grade is the same, the staple length is the same and the color is the same."[7]

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[5] A. B. Cox, supra, n.4, p. 49.

[6] A. B. Cox, supra, n.4, pp. 50-51.

[7] A. B. Cox, supra, n.4, p. 168 (emphasis added).

While the cotton is being classed and assembled into even-running lots on the basis of the samples, the bale itself remains in the warehouse to which it was delivered by the farmer because it is unnecessary and uneconomical to ship the actual bale to a point like Memphis:

"Cotton concentration is a major service performed in cotton marketing. Farmers start the job of assembling cotton when they haul it to the gins and local markets to be made into bales and sold. It is bought and handled in farmer's markets in what is known as "Odd Lots", in units most often of one to a few bales at a time. Farmers aid in concentration but what they do is not a part of concentration as the term is used in cotton marketing. Concentration means specifically the assembling of "Odd Lot" cotton into even-running lots in warehouses selected by cotton merchants for the purpose. These warehouses are located in towns and cities best situated to serve important areas of cotton production, or strategically located with reference to the market for the cotton of the area. These cities, properly equipped with transportation and communication facilities and with warehouse space and compresses, have come to be known as cotton concentration points.

"*The managerial work of cotton concentration takes place in the merchant's office*. The classing department determines the class of each bale bought. Cards are made out for each bale showing in detail the qualities of each bale, its mark, origin, weight, location, price, etc. The cards then become the means of making up even-running qualities and of picking out bales to ship. The facts for cotton concentration for cotton marketing operations are on these records in the merchant's office. *Even-running lots to ship to a mill are thus made up in the merchant's office* and not by warehousemen.

"The actual picking out of the bales of cotton, tagging and marketing them for shipment, loading the bales into cars and taking out the bill of lading are functions performed by warehousemen at the direction of the cotton merchant."[8]

Because the price of cotton is subject to great fluctuations, those who handle the commodity in quantity must protect themselves from rapid price changes by either assuring an actual market for the cotton held by them, or by use of the futures exchange. For the Pittman cotton, Allenberg had already assured a market by advance sales to mills outside the State of Mississippi, at the time Allenberg contracted to buy the cotton in Mississippi.[9]

Where the merchant does not already have a customer to buy the cotton, cotton bought by the merchant is, by normal industry practice, hedged by offsetting sales of futures on the New York Cotton Exchange.[10] The economic function of the futures market is well known and needs no lengthy explanation here.[11]

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[8] A. B. Cox, supra, n. 4, pp. 233-234 (emphasis added).

[9] For an explanation of this practice see first example, infra, n. 11.

[10] This practice is described in several textbooks, see A. B. Cox, supra, n. 4, p. 259 et seq.; A. H. Garside, **Cotton Goes to Market** (Frederick Stokes Co., New York, 1935) p. 206 et seq.; T. S. Miller, **The American Cotton System** (Austin, Tex. 1909), p. 102 et seq.

[11] "It is the function of the commodity futures market to eliminate or reduce the risk of price fluctuations in the process by which a commodity moves from grower to consumer. The method whereby this is accomplished, using the cotton business as an example, is as follows: Contracts on the exchange call for the purchase or sale of cotton for future delivery during a specified month from one to eighteen months from the date the contract is made. A person engaged in the production, manufacture or sale of cotton may take a position on the exchange by buying or selling cotton for future delivery to offset his purchase or commitments in the actual

(Continued on following page.)

It is sufficient to point out that any merchant which contracts to buy cotton from a farmer should either assure itself of a market by resale of the actual cotton to a mill, or should make offsetting sales (hedges) on the cotton exchange.[12] In either case there is immediate and direct reliance on the validity and enforceability of the cotton purchase contract entered into between the merchant and the farmer. If the contract with the farmer cannot be enforced, the merchant is no longer hedging within the

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(continued from preceding page)
commodity and thus hedge (insure) against price fluctuations. This can be illustrated by the example of a merchant who sells spot cotton for delivery to a mill six months from now at a fixed price which gives him a fixed profit based upon current spot prices. He does not now have the cotton and therefore takes the risk of a change in the spot price when he is to acquire it to fulfill his commitment to deliver. To guard against the risk of a change in price, he takes a long position on the futures market of an equivalent amount of cotton (i.e., he makes a contract to purchase cotton for future delivery on the exchange). If the price of spot cotton increases during the six-month period, the price of futures will tend to increase correspondingly and the loss he sustains in having to pay a higher price for spot cotton will be offset by the gain in price on the futures market when he closes out his futures contract at a profit. In another case, the merchant purchases cotton for inventory from a farmer at a fixed price. To avoid the risk of a change in price when he is ready to sell it, he takes a short position on the futures market (i.e., he makes a contract to sell cotton for future delivery on the exchange). If the price of spot cotton decreases the price of futures will tend to decrease correspondingly and the loss he sustains in the value of his inventory will be offset by his gain on the futures market when he closes out his futures contract at a profit . . . The futures exchange is used by those who grow, manufacture, process, sell and utilize cotton and cotton products and wish to hedge against price fluctuations." **Volkart Brothers, Inc. v. Freeman**, 311 F.2d 52 (5th Cir. 1962) pp. 54-55.

[12] The New York Cotton Exchange is a designated contract market under the Commodity Exchange Act. Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by Act of June 15, 1936, c. 545, 49 Stat. 1941, as amended, 7 U.S.C. Sec. 1 et seq. It is now the only active cotton futures market in the United States.

meaning of the Commodity Exchange Act, but becomes an unintended speculator [13] subject to enormous loss if the price of cotton goes higher, because the merchant must replace the cotton it has sold to its customer or sold on the cotton exchange, by buying replacement cotton at the higher market price. If these losses exceed the merchant's capital, defaults will result in the contracts on the futures exchange or on spot cotton sales to the mills.[14] The integrity of the merchant's contract with the initial source of supply, the farmer, is thus the foundation of the entire commodity merchandising system.

"The cotton market is a complex of interrelated, economic forces and institutional facilities which in operation serves to equate the demand for and the supply of cotton in terms of prices. Thus the full concept of the term, 'the cotton market', comprehends all of the specialized, interrelated, physical facilities, economic forces, trade organizations and trading techniques which are involved in the merchandising of cotton. Trade units such as the New Orleans Cotton Exchange or the cotton exchanges in

[13] "Bona fide hedging transactions shall mean sales of any commodity for future delivery on or subject to the rules of any board of trade to the **extent that such sales are offset in quantity by the ownership and purchase of the same cash commodity** or conversely, purchases of any commodity for future delivery on or subject to the rules of any board of trade to the extent that such purchases are offset by sales of the same cash commodity." (Emphasis added), Commodity Exchange Act, supra, n. 9, Sect. 6a(3). The Commodity Exchange Authority has established limits on the size of a **speculative** position which can be taken on the New York Cotton Exchange by a trader. 17 C.F.R. Sect. 150.2 (currently 30,000 bales). But the size of a trader's position on the exchange which is created by bona fide **hedging** is not limited. 17 C.F.R. Sect. 150.2 (c). Thus, if a cotton merchant has made contracts with farmers and has hedged them on the New York Cotton Exchange, and then the contracts are discovered to be unenforceable, the merchant not only faces financial ruin, but also may be subject to civil and criminal penalties for violation of the Commodity Exchange Act, 7 U.S.C. Sect. 1 et seq., if the size of his position exceeds the speculative limits.

[14] Bank financing of the cotton merchant may allow the merchant to
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such cities as Memphis, Tenn., Osaka, Japan, Alexandria, Egypt, and Bremen, Germany, are not self-contained markets but owe their importance to the parts they play in an overall cotton marketing system.

"The area of the cotton market is the extent of territory over which these economic forces and institutional facilities operate effectvely enough to establish competitive price relations. The area of the market for cotton is world-wide, though the facilities for effecting the bulk of the transactions are located in a comparatively few well-known exchanges with world-wide memberships and wire connections. Cotton is used in all parts of the world and has many uses. There are many varieties and qualities of cotton produced in the world and they have a wide range of best uses. Nevertheless, overlapping uses are broad enough and important enough, and costs of communication and transportation are low enough, to make the different growths of cotton of the world (such as American, Indian and Egyptian) highly competitive in the great consumer markets of the world. This competition of various growths of cotton for world markets *establishes a definite price relationship among them and, therefore, a world price and a world market for all cotton* as well as for each major growth (such as American)." [15]

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borrow up to 90% of the price of the raw cotton, because the bank, too, relies on the sale of futures against the purchase of cotton from the farmers to protect the merchant from market risks due to price fluctuations. This allows the cotton merchant to handle a large quantity of cotton on a relatively small amount of capital. A. B. Cox, supra, n. 4, p. 181.

[15] A. B. Cox, supra, n. 4, pp. 1, 2 (emphasis added). See also Dummerier & Heflebower, **Economics with Application to Agriculture**, (McGraw-Hill, 1934) p. 171: "The market for wheat and cotton has in years past been essentially world-wide because of the following facts. Cotton is used by all classes of people in practically all parts of the world except
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"The cotton market is a world market and cotton merchandising is of necessity a world-wide business. Over fifty countries manufacture cotton and most of the cotton spindles (mills) of the world are in countries and areas which produce little or no cotton . . . Thus in a large measure, the factors and forces which locate cotton manufacturing are different from those which locate cotton production. Cotton production is oriented on the globe primarily by climate and soil conditions.

"Cotton textile mills of the world constitute the battleground where United States grown cotton, along with other growths of cotton, will win or lose the fight for markets.

"In this struggle for markets the cotton merchandiser is now, and in the years ahead must be, the closest ally and advisor of the cotton manufacturer . . . Cotton merchants are in the best position to know or find out the availability of various qualities of cotton and their costs. They are, therefore, in a position to help the spinner make blends to get the maximum values out of the cotton he buys.

"Cotton growers constitute another major group to be served by the cotton market. They are essential to the cotton industry for they produce the raw material upon which the cotton industry is built.

"The raw cotton merchandising system is a service institution. Cotton growers are producing cotton as a

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in the very cold regions. Wheat is an important part of the diet in most nations. Both are among the most non-perishable of agricultural products. Cotton at the prices which have normally prevailed in the past and wheat at similar prices are not extremely bulky in relation to value, particularly when it is realized that much of the transportation is by ships over large bodies of water. Baled cotton is easily handled and does not suffer from ocean transportation, and wheat can be handled in bulk cheaply. The latter withstands ocean shipment better than most grains."

raw material to be sold to mills to accomplish specific, predictable results. Whether cotton does what is expected of it depends on the qualities of the cotton and the accuracy with which it is classed. The qualities of cotton coming into the market are determined in the long run by the premiums and discounts received by growers for the cotton they sell, for these become the major factors determining the kinds of seed planted, cultural practics, and manner of harvesting and ginning. Use values and competition force manufacturers to pay premiums for the better qualities of cotton such as longer staples, higher grades, and finer, stronger fibers or superior working qualities, especially in "even-running" lots, and likewise to pay discounts for cotton which has the opposite characteristics. *It is the responsibility of the cotton marketing system to pay proper premiums and discounts to the cotton growers as incentives to grow the cotton required by the market.*

"*The biggest, most important service the cotton marketing system can render cotton growers is to make prices paid to farmers in local communities and regions true guides in direction of production.* This means that the varieties of cotton best suited to a region will and should sell at relatively the highest price and other cottons, whether longer or shorter in staple, will sell at relatively lower prices. The farmer who grows an inch and a quarter staple cotton on land and in a region devoted and best adapted to producing 15/16 inch cotton renders a disservice, because the cotton so grown is difficult to merchandise and is of doubtful value as there is not enough of it to make "even-running" lots of one hundred bales.

"Cotton growers harvest their cotton over a three or four months' period. They pay relatively high rates of interest, and they need to sell all of their production at the time of harvest. It is a function of the cotton market

to absorb and carry this supply until needed and without undue depression of the price at time of harvest.

"Some cotton growers, and the number is destined to increase as mechanization increases, ***wish to sell portions of their anticipated production before they plant their cotton in order to secure a hedge against their outlays for production***. The market must furnish this service.

"The cotton marketing system is likewise expected to give ***protection to those who furnish the funds to finance stocks of cotton***. It is also expected to furnish the means and ***conditions for competitive trading which are adequate to maintain prices of cotton at levels most nearly equal to the world's best judgment of its value***."[16]

As for foregoing material shows, the market for cotton is worldwide because, although there are many varieties and qualities of cotton, the costs of communication and transportation are sufficiently low to make competition between various growths and this establishes definite price relationships among those growths, creating world prices and a world market.

Cotton merchants such as Allenberg establish the vital link between the consuming mills and the producing farms. Competition between merchants causes the farmer to be paid proper premiums and discounts for whatever variety of cotton he produces.

The American Cotton Shippers Association is the trade association that represents approximately 492 United States cotton merchants. These 492 merchants handle over 70% of the raw cotton sold to domestic textile mills, and over 80% of the U. S. Cotton crop sold in foreign markets.[17]

[16] A. B. Cox, supra n. 4, pp. 5-10 (emphasis added).

[17] **Brief for the American Cotton Shippers Association as Amicus Curiae**, p. 3, citing Hearings Before the Subcommittee on Domestic Marketing and Consumer Relations of the Committee on Agriculture, 92nd Cong., 2nd Sess. (Statement of Neal P. Gillen in connection with H.R. 14987 on Aug. 16, 1972).

These 492 merchants are economically able to buy and sell enormous quantities of cotton on relatively small amounts of capital:

"Cotton merchants put the bulk of the supply of cotton on the futures markets through the sale of futures contracts against unsold spot [i.e. 'cash' or 'actual' cotton, as distinguished from 'futures'] cotton *** They take their warehouse receipts and their contracts showing sale of futures against the spot cotton, which together make prime collateral, to banks, and ***borrow up to 90 per cent of the price of the raw cotton***. In this way banks are enabled to furnish the bulk of the money to finance cotton stocks with very little risks on their part **** It is important to understand that, while banks furnish the bulk of the money to finance the carrying of cotton, ***they are enabled to do it because the organization of the cotton merchandising system enables the cotton trade to eliminate most of the risks in cotton by offset*** ..."[18]

If contracts for the purchase of spot cotton between farmers and merchants cannot be enforced by merchants, or are rendered questionable, the offset or hedging of the cotton against unfavorable price changes could not be accomplished. If hedging was not possible, credit sources for the industry would not be available. If credit was not available, then only merchants with enormous capital could afford to purchase cotton, and those buyers would have to insure an enormous spread between the price paid the farmer and the resale price in order to cover possible price variations. This would result in fewer merchants competing to purchase the farmers' cotton, and lower prices for the farmer.

[18] A. B. Cox, supra n. 4, p. 181 (emphasis added).

The fundamentals of cotton merchandising cited above are essentially the same whether the merchant contracts to buy the farmer's cotton before or after it is produced. If the merchant contracts before the crop is produced, he must be even more certain that his position is balanced because he must maintain it over a longer period of time and incur greater price risks.

Traditionally, the cotton crop produced in the United States has been sold in the fall after harvesting. Without government intervention, this practice of selling in the fall would leave the farmer in the precarious circumstances of having to invest a year's labor and materials in his crop without knowing whether he would be able to sell the crop at a price adequate to recoup his investment.

Government loan and subsidy programs have, in some measure, enabled farmers to reduce the risk of a poor sales price. A number of different programs have been used since the New Deal, but "a program of purchases and non-recourse commodity loans has been the basic foundation of United States farm price and income policy since the mid-1930's. While these programs do not alter the underlying consumer demand for farm products, they have operated in such a way as to provide an outlet for that portion of farm output that would otherwise have cleared the market only at much lower prices."[19]

Under the loan and storage program a farmer, using his expected crop as security, received a non-recourse loan from the Commodity Credit Corporation (CCC). If he was unable to market his cotton for more than the amount of the loan, he could deliver it to the CCC in satisfaction of

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[19] D. E. Hathaway, **Government and Agriculture**, (MacMillan Company, N. Y. 1963) p. 260.

the loan. This policy produced huge cotton surpluses stored in CCC warehouses.[20]

In order to reduce the surpluses the federal government curtailed the planting of cotton on more than a certain allotted acreage. Such a program was in effect in the United States prior to 1970.[21]

However, by 1970 the surpluses were gone and a basic change was made in the cotton program of the United States.[22] Under the Act of November 30, 1970, P. L. 91-524, farmers were allowed to produce cotton on as many acres as they desired. However, the government price support was available only for the cotton produced on the farmer's acreage allotment. The cotton produced on other than allotted acreage was produced at the farmer's own risk. The first crop year to which this new program applied was 1971. Thus, in 1971, before planting, many U. S. cotton farmers began to look for a way to protect themselves against a price decline if they should decide to plant cotton for which there was no government price support. For this reason, 1971 was the first year of the widespread use of a new type of contractual arrangement, the "forward"[23] contract. In 1971 11% of the United States upland[24] cotton crop was "forward" contracted, i.e. was contracted to be

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[20] See "Need for Legislation", 1970 U. S. Code, Cong. & Adm. News, p. 6198, summarizing the need for P. L. 91-524, discussed in text, infra.

[21] U. S. C. Sect. 1444 as effective prior to the Act of November 30, 1970, P. L. 91-524.

[22] Op. cit. supra n. 20.

[23] As used herein the term "forward contract" means an executory contract made prior to harvest, as distinguished from the traditional sale of cotton after harvest, which normally was not executory but consisted of immediate delivery of warehouse receipts in exchange for payment.

[24] "Upland" cotton is also called "American cotton". The term means cotton grown in the Southeastern United States. Dictionary of the English

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sold in advance of harvest.[25]

One of the 1971 forward contracts was the contract between Appellant-Allenberg and Appellee-Pittman. That contract was signed in January, 1971 and applied to the production of cotton by Pittman during the 1971 crop year. Thus Pittman, and other farmers who also forward contracted, knew even before they planted that they had a market for their cotton—in effect a price support from a private source, the cotton merchant. (As stated above, by the fall of 1971 Pittman found that the market price for his cotton exceeded the contract price, and he refused to deliver to Allenberg.)

In 1972 the practice of forward contracting became more popular and 32% of the United States upland cotton crop was sold in advance of harvest.[26]

Farmers who made forward contracts in the early part of 1972, for example in February, 1972, received an average price per pound of 30.27 cents.[27] Those who waited until time of harvest to sell their cotton, for example in October, 1972, only received an average price of 25.56 cents per pound.[28] No doubt this experience had a great deal to do with the further increase in the use of forward contracting in 1973.

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Language (Random House, Unabridged 1966) p. 1570. Of a total 1973 U.S. crop of 12,740,000 bales only 112,000 bales is other than "upland". U.S. Department of Agriculture, **August 1973 Crop Report** (Aug. 9, 1973) p. 2.

[25] U. S. Dept. of Agriculture, **Cotton Situation**, (Oct. 1971) CS-253 p. 12.

[26] **August 1973 Crop Report**, supra n. 24, pp. 2 and 12.

[27] **Supp. for 1972 to Bulletin No. 417 - Statistics on Cotton & Related Data 1930-1967**, supra, n. 4, p. 85.

[28] Id. The 1972 price decline was directly contrary to the predictions of many respected "authorities". See, "Why Farmers are Bullish for 72", **The Farm Quarterly** (Feb. 1972) pp. 41-42.

Figures published by the U.S. Department of Agriculture in August 1973 showed "well over half of the 1973 crop was forward contracted . . . The percentage of acreage booked ranged from 28% in the Southwest to 72% in the [Mississippi] Delta."[29] Final figures by the U.S. Department of Agriculture indicate that about three-quarters of the nation's cotton crop was forward contracted in 1973.[30]

However, with the majority of the nation's cotton crop forward contracted in 1973, the economic picture suddenly changed. Contemporaneous with devaluation of the dollar came large crop failures abroad, and seven million bales of cotton were sold for export.[31] U.S. cotton farmers had planted fewer acres in 1973 in response to a cut in national base acreage allotment by the Department of Agriculture.[32] In the spring of 1973 the cotton crop was further reduced by extensive flooding in the Mississippi Delta.[33] All of these factors combined to create an unprecedented price rise which was described by the U.S. Department of Agriculture as follows: "Prices have skyrocketed in recent months as demand outpaced available supplies. These highest prices since the Civil War raise concern that some cotton producers may be reluctant to deliver cotton at lower prices contracted earlier."[34]

The State of Mississippi is located in the Delta area in which 72% of the cotton crop was forward contracted. On April 16, 1973, just as the wild boom in cotton prices was

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[29] Op. cit. supra, n. 26.

[30] U.S. Department of Agriculture, **Cotton Situation**, CS-253 (April 1974) p. 6.

[31] U.S. Department of Agriculture, **Cotton Situation**, CS-253 (Nov. 1973) p. 9; U.S. Department of Agriculture, **Cotton Situation**, CS-253 (April 1974) p. 5.

[32] U.S. Department of Agriculture, **Cotton Situation**, CS-253 (Aug. 1973) p. 3.

[33] Id.

[34] **Cotton Situation** (Nov. 1973), supra n. 31, p. 5.

getting started, the Supreme Court of Mississippi rendered the opinion in the instant case holding that no foreign cotton merchant or mill with a forward contract for purchase of cotton in Mississippi, could enforce that contract unless it had qualified to do business in Mississippi prior to the signing of the contract.

There are about 1.6 million bales of cotton produced in Mississippi in a normal crop year.[35] Seventy-two percent of this number would mean that there were approximately 1,152,000 bales under forward contract. Between the spring of 1973 and the peak price levels in the fall and winter of 1973 the price of cotton rose about $250.00 per bale.[36] Thus, the total market difference created by the price rise in the 72% of the Mississippi cotton crop which was forward contracted was 288 million dollars.

Faced not only with an unprecedented economic incentive to breach their contracts, but also supported by the decision of the Mississippi Supreme Court in this case, Mississippi farmers repudiated these 1973 forward contracts by the score.[37] There were also repudiations of forward contracts in Arkansas and Alabama, two cotton states in which the state statutes are similar to Mississippi's in prohibiting

[35] **Supp. for 1972 to Bulletin No. 417 - Statistics on Cotton & Related Data 1930-1967**, supra n. 3, p. 58, Table 61.

[36] Each bale of cotton weighs approximately 500 pounds. The price rise began at a level in the low 30 cents per pound range, and ended over 90 cents per pound; 50 cents per pound is $250 per bale. Compare, for example, the price of middling 1-1/16" cotton in the Memphis market in January, 1973, of 31.50 cents per pound, with its price in September, 1973, of 86.40 cents per pound. **Memphis Commercial Appeal**, February 1, 1973, p. 55 and September 21, 1973, p. 28.

[37] **Allenberg Cotton Co., Inc. v. Coleman**, 369 F. Supp. 426, 428, (N.D. Miss. 1974). In that case involving 1973 contracts, the District Court took judicial notice of its own docket to "observe that literally scores of suits have been filed to either enforce or rescind advance or forward contracts for the sale and delivery of cotton fiber."

enforcement of contracts made without qualification and in barring remedial qualification, that is, qualification after the contract has been breached.[38]

In 1973 the Congress made another basic change in the cotton price support system. Under the new program federal intervention will only take place if the price of cotton falls below a target price of 38 cents per pound:

> "The recently enacted Agriculture & Consumer Protection Act of 1973[39] contains provisions applicable to upland cotton beginning with the 1974/75 marketing year . . . In announcing the upland cotton program for 1974 Secretary of Agriculture Butz stated: 'A principal feature of the upland cotton program is the target price concept embodied in the 1973 Act. If the average market price received by farmers during the 1974 calendar year is at or above the 38 cent target price, no payments will be made . . .' Prices are strong and ***opportunities to contract ahead appear to be increasing***; farmers should plan accordingly."[40]

Prior to the 1974 crop year, cotton farmers received two types of support from the federal government. They received a loan about midway through the crop year, which was a source of operating capital, as well as a guaranteed minimum market price; and, after sale of the crop they also received a direct subsidy payment for each pound of cotton grown on allotment acreage regardless of the price at which the farmer sold his crop.

[38] e.g. **J. E. Crump v. Cone Mills Corporation**, U.S.D.C., E.D. Ark., No. PB-73-C-209; and **Reigal Fiber Corp. v. Ellis Brothers**, et al., U.S.D.C. N.D. Ala. No. 73P-954. In **Reigal** the defense interposed that the foreign corporation was not qualified (in this case a cotton mill) was overruled in a preliminary motion. A motion raising this defense in **Cone Mills** is still pending at this writing.

[39] P.L. 93-86. See 1973 U.S. Code Cong. and Adm. News 2498 et seq.

[40] **Cotton Situation (Nov. 1973)**, supra n. 31, p. 5 (emphasis added).

For example, in 1973, the U.S. Commodity Credit Corporation loan was 19.50 cents per pound.[41] Farmers were loaned an amount of money based on this figure and their average yields for the past three years on the allotted acreage only. They could repay the loan upon sale of the crop, or deliver the crop to the CCC in satisfaction of the loan. Since 1973 prices stayed above this price, the CCC purchase program was not used, i.e. farmers did not deliver their cotton to the CCC to satisfy the loan. Apart from the loan, cotton farmers received a direct subsidy payment of 15 cents per pound in 1973 (the same amount as in 1972 and 1971) for all cotton grown on allotted acreage.[42] Thus a farmer who had sold his allotment cotton in 1973 to a merchant for 30 cents per pound, received a total of 45 cents per pound for the crop. Farmers who sold at higher prices still received the 15 cents per pound subsidy payment.

In 1974, under P.L. 93-86, no farmer will receive any subsidy payment unless the average cotton price received drops below the target price of 38 cents per pound, and then the price support payment will only be paid for cotton grown on allotment acreage.[43]

Should the price of cotton stay above 38 cents in 1974, for the first time in many years the United States will pay no subsidy to its cotton farmers. And further, under the new program, it would be anticipated that farmers could obtain operating funds from private sources using forward

[41] **Cotton Situation (Nov. 1973)**, supra n. 31, p. 9. 19.50 cents was the loan per pound for the base quality: Middling 1-inch upland cotton. Other qualities and grades of cotton had different loan prices expressed in terms of points (each point is 1/100th cent) on or off this base price.

[42] Id.

[43] 7 U.S.C. Sec. 1444, as amended.

contracts as collateral. This will be necessary because the CCC loan is partial only, is based on a low price, and only on production on the allotment acreage. Additional capital will be necessary to finance larger plantings. As Secretary Butz' statement shows, it is hoped that farmers will be able to make forward contracts in 1974 to protect themselves[44] from adverse price changes by securing a favorable market for their cotton before planting; and to serve as collateral for obtaining operating funds.

Following the traumatic experiences of 1973, cotton merchants have been reluctant to enter forward contracts in 1974 at price differentials acceptable to the farmer. At this writing the most recent U.S. Department of Agriculture reports show forward contracting of the 1974 cotton crop "at a standstill."[45] The forward contract, which was intended to produce security for both parties, has proved a high risk proposition for the buyer in the courts, and has thus become less desirable as a commercial instrument.

In 1973 the nation's upland cotton crop was 12.9 million bales of which approximately seven million bales was sold for export.[46] The farm value (price paid by merchants and other direct buyers to the farmer) of the 1973 upland cotton crop totaled $2-3/4 billion.[47]

[44] The protection which would be afforded to a farmer by a forward contract for 1974 and thereafter is three-fold: First, securing a price above 38 cents renders price protection beyond the government target price; second, the forward price is the only protection for the value of the crop raised on acres not covered by the government allotment; and third, it enables the farmer to insure lenders that he has a market for the cotton at a price which will enable him to repay a commercial loan, thus becoming a basis for financing farm operations.

[45] **Cotton Situation CS-253 (April 1974)**, supra n. 31, p. 5.

[46] **Cotton Situation CS-253 (April 1974)**, supra n. 31, p. 7.

[47] **Cotton Situation CS-253 (April 1974)**, supra n. 31, p. 13.

Small, highly competitive cotton merchant firms such as Allenberg, as an industry group, bought and sold over $2 billion worth of cotton in 1973, principally on borrowed capital using the integrity of both purchase and sales contracts to protect themselves against adverse price movements.[48] Over half of their sales were for export.[49]

The basic principles of cotton merchandising, outlined above, are the same for every raw agricultural commodity merchandising group in the nation: wheat, soybeans, sugar, corn, etc.[50] The integrity of the merchant's contract with the initial source of supply, the farmer, is the foundation of the nation's commodity merchandising system.

Competition in every area of the nation for the farmer's crop is necessary to insure that proper price differentials are paid to the farmer and that the nation's agricultural resources are distributed on an economic basis. If state courts are permitted to introduce unexpected and extraordinary legal risks into the market place instead of the certain enforceability of contracts, and if potential purchasers of cotton or other commodities are foreclosed from bidding for contracts in a given state because they have not previously qualified there, this vital competition will be diminished.

In the current legislative session, the United States Congress is studying the marketing of the nation's agricultural commodities in connection with possible revision of the Commodity Exchange Act.[51] The report produced

[48] See materials at notes, 47, 17, 18, 11, supra.

[49] Cotton Situation (April 1974), supra n. 32, p. 5; and Hearings, supra n. 17.

[50] See, Small Business Problems Involved in the Marketing of Grain and Other Commodities, Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, 93rd Cong., 2d Sess. (House Report No. 93-963, of April 1, 1974).

[51] 7 U.S.C. Sec. 1 et seq.

as a result of that study is quoted below in part. The commodity used as an example in the quotation is wheat, and the problem addressed is the need to protect the integrity of contracts on the futures exchanges (by which purchases in the cash market are offset). But the observations made are equally applicable to cotton, and to the need to protect the integrity of contracts in the cash market (by which futures contracts are offset):

> *"It is now common practice for producers to contract with a local elevator in advance of the time the grain or fibers are harvested for the delivery of a certain number of units at a fixed price. Many creditors demand that the farmers forward contract* in order to reduce the risk these producers would have in the marketplace. Other producers forward contract on part of their crop in order to assure themselves that they will receive at least the cost of production. These local grain merchandisers either directly or through another medium almost always immediately sell the same volume of grain on the futures market by purchasing a short contract for a future month. In other words, they agree to either deliver the grain or buy the contract back at a specified time. Under this arrangement, they have been able to offset any losses or gains in the cash market which would occur on their inventory with a corresponding loss or gain on their futures contracts. *By using this system, elevators in the corn belt prior to this year were able to reduce the margin, that is, the amount they keep for themselves for handling the transactions, to around 3 cents per bushel and still make a reasonable profit. Without a place to hedge, however, these commodity merchants would have had to deduct a much larger margin for themselves.*
>
> *"Our marketing system has been, on an overall basis, a very good thing for producers, processors, consumers,*

and the nation as a whole. In fact, the system historically has operated so well that people within the system itself ***can not believe how near it is to collapsing and how vulnerable it is to manipulation and abuses***. One of the reasons that the vulnerability is not apparent is that for the last several years there has always been a surplus of most commodities and also an abundance of transportation to shift those commodities around so that if need be a commodity could be delivered in lieu of buying back a futures contract. This situation has now changed. We not only do not have a surplus but we also do not have an insulated reserve which could be used to reduce the height of the peaks and the depth of the valleys."[52]

A commodity merchant handles an enormous value of goods, trading at very small margins of profit. In the cotton industry about 1.6% of the cost of the retail cotton product goes for "merchandising" of raw fiber — "merchandising" includes the cost of marking, tagging, weighing, compressing, storing, loading, grading, buying, selling, financing, and transportation.[53] Cotton merchants who purchase raw cotton for resale are able to resell at small margins only if there is absolute certainty that both sales and purchase contracts will be honored.

". . . during the past 150 years the food and fiber segment of our economy has evolved from a status of self-sufficiency to one of intricate interdependency with great segments of our industrial economy . . . . The present agribusiness economy has come about by the

[52]**Report**, p. 7, op. cit, supra n. 50 (emphasis added).

[53]Wilcox and Cochrane, **Economics of American Agriculture** (Prentice-Hall, 2nd ed. 1960) pp. 128-131 citing U.S. Department of Agriculture statement prepared by Maurice Cooper and Frank Lowenstein.

gradual dispersion of functions from agriculture to business, particularly those relating to the manufacture of production supplies and the processing and distribution of food and fiber products. This has continued to the point where today agriculture retains primarily the function of producing crops and livestock.

"It is important to keep in mind that modern agribusiness is the result of a combination of forces actively at work for a century and a half and with roots running back even deeper into history. In no sense is it the result of a preconceived plan or design being carried to completion. Rather, it is the product of a complex of evolutionary forces more or less spontaneously at work without central guidance or direction. In fact, so gradual has been the development of agribusiness that students of agriculture and business largely have failed to recognize its significance."[54]

The evolution of our commodity merchandising system has included legislative and judicial steps to foster competition and protect the integrity of contracts upon which the system depends. The enactment of the Commodity Exchange Act was one such step. Another was the fostering of interstate competition for farm commodities by exempting foreign corporate buyers from local qualification requirements. The case of ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 882 (1921), and numerous other cases and statutes following the rule of ***Dahnke*** have, over the years become integral parts of that "complex of evolutionary forces" which now constitute our agricultural marketing system.

[54]Davis and Goldberg, **A Concept of Agribusiness** (Harvard University Press 1957) 6.

Over one million bales of cotton in Mississippi were under forward contract in 1973, most of which were under contract to Memphis or other out-of-state merchants.[55] The immediate product of the decision of the Mississippi Supreme Court in this case was the repudiation of vast numbers of forward contracts and the filing of scores of lawsuits in the United States District Courts of Mississippi.[56]

To illustrate this 1973 situation, assume cotton merchant (CM) is a Tennessee corporation which has purchased cotton through independent local brokers in many of the fifteen states in the Cotton Belt, but principally in the "Memphis territory", consisting of Arkansas, Mississippi, Missouri, Louisiana, and Tennessee. CM has a net capital of two million dollars, making it one of the largest companies in the industry. With 90% bank financing CM can "own" cotton worth about twenty million dollars at any given time. With normal prices, volume, and turnover CM might buy and sell 150,000 to 200,000 bales of cotton a year.

In the spring of 1973 CM makes forward contracts with Mississippi farmers and under these contracts CM expects to receive 50,000 bales of cotton at $150.00 per bale (30 cents per pound) for a total purchase price of $7,500,000.00. CM hedges these purchases by sales on the New York Cotton Exchange or with cotton mills (as CM makes sales contracts with mills during the year it will 'take out' its hedge on the futures exchange by an offsetting trade, and replace the hedge on the futures exchange with a hedge created by a sale to a mill).

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[55]The bulk of the nation's cotton crop is merchandised through Memphis, Tennessee cotton merchants. **Cotton Situation (Oct. 1971)**, supra n. 25, at 13.

[56]**Allenberg Cotton Company, Inc., v. Coleman**, supra n. 37, at 428.

The price agreed with the farmer is based upon the price at which CM has a mill sale or at which CM can hedge on the exchange. By the end of the spring of 1973 CM has forward contracts to buy 50,000 bales of Mississippi cotton at 30 cents per pound, and has contracts to sell 50,000 bales at 35 cents per pound.

During 1973, the market price of cotton goes up to 85 cents; but contemporaneously, CM's contracts in Mississippi are rendered unenforceable by the decision of the Mississippi Supreme Court in this case. But CM must deliver 50,000 bales of cotton on its sales contracts at 35 cents per pound.

Despite the court decision, most (assume 80%) of the farmers with whom CM had contracts still deliver their cotton. On these contracts, CM receives a gross mark-up of $25.00 per bale (5 cents per pound). After freight, interest, storage, and other costs are paid CM makes a pretax net profit of $4.00 per bale or $80,000.00 on gross sales of $11,000,000.00 (40,000 bales at 35 cents per pound).

As to the 20% which is in default, CM must look to the open market. CM must deliver 10,000 bales to its customers at a price of 35 cents per pound, but replacement cotton would cost CM 85 cents. CM cannot borrow money to purchase replacement cotton for delivery at a loss, so it must use its net capital of two million dollars. But the purchase of 10,000 bales at 85 cents for delivery on 35 cent contracts would cost CM $2.5 million. CM, a merchant which might normally buy and sell 200,000 bales of cotton a year, is rendered bankrupt by defaults of 10,000 bales.

This was the situation faced in 1973, in varying degrees of severity, by an important part of the cotton industry as a result of the convergence of the price rise, and the abandonment of *Dahnke* in one state. Only the decisive re-establishment of *Dahnke* by the United States District

Court for the Northern District of Mississippi in the midst of the delivery season, prevented the financial ruin of that part of the cotton industry which had relied upon Mississippi forward contracts as a source of supply. The companion cases of ***Cone Mills Corporation v. Hurdle, et al.*** and ***Allenberg Cotton Company, Inc., v. Coleman, et al.***[57] were handed down on January 10, 1974, while prices were still at peak levels. Although the relief granted was preliminary,[58] the full dress opinion of the District Court made it clear that the contracts were enforceable in the federal courts.

C. The Procedural Posture of This Appeal

Prior to trial, Pittman filed an "Answer to [Allenberg's] Amended Bill of Complaint and Decree of Discovery" (A. 14) setting forth as an affirmative defense that Allenberg was "a foreign corporation doing business in the State of Mississippi and it is not qualified to do business in the State of Mississippi as required by § 5309-221 [sic] of the Mississippi Code of 1942 Annotated" (A. 16).

After hearing evidence on the circumstances concerning the making of the crop purchase contract and Allenberg's activities in Mississippi, and after argument by the parties, the Chancery Court of Quitman County rejected Pittman's affirmative defense, and expressly ruled, that Allenberg was not doing business within the State of Mississippi under § 5309-239 of the Mississippi Code of 1942 (A. 111).

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[57] Cited as **Allenberg Cotton Company, Inc., v. Coleman**, supra, n. 37.

[58] A preliminary mandatory injunction ordering delivery of the cotton at the contract price was granted in both cases. Since then, **Allenberg Cotton Company, Inc., v. Coleman** has been settled. **Cole Mills Corporation v. Hurdle, et al.** involving repudiations of contracts for about 4000 acres still pends on a calendar full of cotton cases.

§ 5309-221 of the Mississippi Code of 1942 is a companion to § 5309-239 and contains a listing of activities which are not "transacting business" under § 5309-239. § 5309-221 provides, inter alia, that "a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this Act, by reason of carrying on in this state any one or more of the following activities: . . . (e) transacting any business in interstate commerce."

On appeal, the Supreme Court of Mississippi reversed, stating: "Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might, afterward sell it in interstate commerce." Opinion of the Mississippi Supreme Court, ***Jurisdictional Statement***, p. A. 6. This was a flat rejection of Allenberg's contention that its activities were in interstate commerce.

A timely Petition for Rehearing was filed with the Mississippi Supreme Court on May 1, 1974.[3] The Petition of Rehearing argued that the decision of the Mississippi Supreme Court "is in direct violation of Clause 3 of Section VIII of Article I of the Constitution of the United States [the Commerce Clause] . . ." Petition for Rehearing, p. 17. The Petition contained an extensive briefing of ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282 (1921) in support of the Commerce Clause argument.

The Petition for Rehearing was denied without comment on May 14, 1974.[3]

On August 17, 1974,[3] the Mississippi Supreme Court entered an "Order Certifying Issues Decided." This Order provided:

IN THE SUPREME COURT OF MISSISSIPPI

BEN E. PITTMAN

VERSUS NO. 47,037

ALLENBERG COTTON COMPANY, INC.

ORDER CERTIFYING ISSUES DECIDED

On application of the appellee, Allenberg Cotton Company, Inc., this Court in addition to the orders made herein, hereby certifies and makes a part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein, that in this appeal from the Chancery Court of Quitman County, and in the arguments both oral and by brief made in this Court on behalf of the appellee on the original appeal and the petition of appellee for rehearing and brief filed in support thereof, it was insisted by appellee that under the facts of this case, the contract sued upon by the appellee was made in "interstate commerce" and thus entitled to protection as such under the applicable statutes of Mississippi and the Commerce Clause of the Federal Constitution; and that in its deliberation of this case, this Court both on the original appeal and the petition for rehearing considered these questions of interstate commerce; and it was the judgment of this Court that said contract was not made in interstate commerce, nor that the facts of the case showed appellee to be transacting business in interstate commerce within the meaning of the laws of Mississippi and that Mississippi Code 1942 Ann. Section 5309-239 (Supp. 1972) as applied by this Court in this case to the Allenberg Cotton Company, Inc., a Tennessee corporation, to bar it from maintaining suit in the courts of this state was not repugnant to the Commerce Clause of the United States Constitution;

and it was necessary to the Court's judgment in said case to determine said questions raised as to interstate commerce, and that such questions were determined adversely to the position of appellee.

It is hereby certified that this Court is the highest court of law and equity in the State of Mississippi in which a decision of this case could be had.

ORDERED, this the 17th day of August, 1973.

/s/ Robert G. Gillespie
CHIEF JUSTICE
SUPREME COURT OF MISSISSIPPI

SUMMARY OF ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION OVER THIS APPEAL.

A. A CERTIFICATION BY A STATE COURT THAT HAS NECESSARILY DECIDED A FEDERAL QUESTION IS A SUFFICIENT SUBSTANTIATION TO SUPPORT JURISDICTION OVER THE QUESTION.

The requirement that a federal question has been presented and necessarily decided in the state court stems from the dual federal system, and the principle that the state courts are to be the final word on state law. *Murdock v. City of Memphis*, 87 U.S. 590 (1875); *Erie v. Tompkins*, 304 U.S. 64 (1938); Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 319 (1969).

Where a state supreme court has necessarily decided a federal question, and has certified that it has done so, there can be no danger of improper intrusion by the Supreme Court into an area of state law. *Whitney v. California*, 274 U.S. 357, 360-1 (1926); *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134 (1913); *Coleman v. Alabama*, 377 U.S. 127, 133 (1964); Stern & Gressman, *Supreme Court Practice*(4th Ed.) 127 (1969).

The Certificate obtained by Appellant in this case establishes that the federal constitutional question was considered by the state court and that a decision of that issue was necessary for the decision of the case. *Jurisdictional Statement*, A. 1, A. 6. The Certificate was prepared by counsel following the form of certificate found sufficient in the previous decision of the Court of *Cincinnati, P.B.S. & P. Packet Co. v. Bay*,200 U.S. 179 (1905) which is reproduced for this purpose in Stern & Gressman, *Supreme Court Practice*(4th Ed.) 676 (1969).

Appellee asserts that because the Certificate was physically signed by only one justice, it is insufficient. The Certificate shows on its face it is a certificate of the *court*, using language identical to that of the certificate in *Cincinnati v. Bay*, which certificate was also physically signed by one justice of the state court. In addition, the Clerk of the Supreme Court of Mississippi has certified the document as an order of that *court*.

A certificate from a state supreme court that a constitutional question was raised and necessarily decided below should be conclusive. Further inquiry into the matter would intrude into an area of state concern, and irrationally distinguish between the weight given the opinion of the court below and its expressions taking a slightly different form. *Lynumn v. Illinois*, 368 U.S. 908, 372 U.S. 528 (1963); *Raley v. Ohio*, 360 U.S. 423 (1959); *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185-186 (1945).

B. WHERE A STATE STATUTE INCORPORATES A CONSTITUTIONALLY REQUIRED EXEMPTION, AND THE QUESTION OF APPLICATION OF THE EXEMPTION WAS DECIDED BELOW, THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE QUESTION.

Mississippi statutes expressly incorporate the constitutionally required exemption for foreign corporations whose only activity in Mississippi is transacting business in "interstate commerce." Mississippi Code 1942 Annotated §5309-221(e) (Supp. 1972). The statutory exemption was intended to incorporate the constitutional law (and must do so). Model Business Corporation Act Annotated §166, 2d Par. ¶4.05; *Allenberg Cotton Company, Inc. v. Coleman*, 369 F. Supp. 426 (N.D. Miss. 1974).

The Mississippi Supreme Court construed the statutory exemption not to apply to Allenberg's activities in Mississippi.

Where the meaning of a state statute depends upon federal law incorporated by it, a construction of the state statute interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision. Robertson & Kirkham, ***Jurisdiction of the Supreme Court of the United States***, §99 (Wolfson & Kurland ed. 1951); ***Standard Oil Company v. Johnson***, 316 U.S. 481 (1942); ***Smith v. Kansas City Title & Trust Co.***, 225 U.S. 180 (1921); ***State Tax Commission v. Van Cott***, 306 U.S. 511 (1939).

C. A CHALLENGE TO STATE INTERFERENCE WITH CONSTITUTIONAL RIGHTS IS TIMELY ASSERTED IN A PETITION FOR REHEARING WHERE THAT VEHICLE PRESENTED THE FIRST OPPORTUNITY FOR THAT CHALLENGE AFTER ACTUAL INTERFERENCE WITH SUCH RIGHTS.

If it is assumed that the Mississippi statutory exemption for "interstate commerce" was wholly a matter of state law, it would still be the case that the Constitutional issue was timely raised. A litigant is not required to anticipate deprivation of constitutional rights or invoke their protection in advance of actual interference with those rights. ***Missouri ex rel Missouri Insurance Co. v. Gehner***, 281 U.S. 313 (1930); ***Brinkerhoff-Faris Trust & Savings Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917); ***United Public Workers v. Mitchell***, 330 U.S. 75 (1947). Since Allenberg won in the trial court and was exempted from the qualification requirement, the first actual interference with its Constitutional rights came

after the decision of the Mississippi Supreme Court. Allenberg's assertion in its Petition for Rehearing, that the state decision conflicted with the commerce clause, came at the first available time after the interference and thus was timely. ***Corn Products Refining Co. v. Eddy***, 249 U.S. 428, 432 (1919).

II. MISSISSIPPI'S REFUSAL TO ALLOW A FOREIGN CORPORATION TO ENFORCE ITS CONTRACT WITH A MISSISSIPPI RESIDENT FOR THE PURCHASE OF COTTON TO BE SHIPPED FROM THE STATE IS REPUGNANT TO THE COMMERCE CLAUSE.

A. APPLICATION OF THE *DAHNKE* PRINCIPLE.

The contract which is the subject of this suit was made after Pittman approached a local cotton broker, Mr. Covington, and asked Covington if he could obtain 22¢ per pound for his cotton. Covington was an independent, part-time broker who had no authority to make a contract. Covington relayed the offer to Allenberg in Memphis, Tennessee, by telephone, and after negotiations by telephone, a bargain was struck. Allenberg prepared a written contract, signed it in Memphis, and sent it to Mississippi where it was signed by Pittman. Contemporaneously Allenberg entered contracts to sell cotton to cotton mills outside of Mississippi in the expectation of receiving this and other cotton purchased by it. After growing and harvesting the cotton Pittman was to store it in a warehouse and deliver negotiable warehouse receipts to obtain payment. Allenberg would then classify Pittman's cotton, pool the bales into "even running lots" according to quality, and issue shipping orders to the warehouse to ship the even running lots to mills outside of Mississippi. Virtually all cotton grown in Mississippi is shipped outside of the state

because there is no significant milling activity in the state.

In all relevant features this case is on all fours with *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921), where Kentucky courts were closed to enforcement of a contract by an unqualified foreign corporation buying wheat for shipment to Tennessee. Not only are the facts of the instant case and *Dahnke* strikingly parallel, the analysis applied and legal conclusions reached here by the Mississippi Supreme Court are identical to those of the Kentucky Supreme Court in the latter's decision which was reversed by the United States Supreme Court.

In *Dahnke* the United States Supreme Court held: "Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation." This principle was not applied by the Mississippi Supreme Court in the present case.

The principle applied in *Dahnke* in 1921 had been applied in many previous cases: *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).

Before the depression the court applied the principle in a number of important cases involving the Commerce Clause, both to uphold the exercise of Congressional power, and to protect the national common market in commodities from actions by the states. *Lemke v. Farmer's Grain Co.*, 258 U.S. 51 (1922); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Shafer v. Farmers' Grain Company*, 268 U.S. 187 (1925); *Flanagan v. Federal Coal Company*, 267 U.S. 222 (1925).

In the post-depression cases the *Dahnke* principle that "where commodities are bought for use beyond state lines, the purchase is a part of interstate commerce" was reaffirmed in decisions upholding Congressional regulation of such purchases. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 568-69 (1939) (citing *Dahnke*, *Stafford*, and *Lemke*); *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939); *Currins v. Wallace*, 306 U.S. 1 (1939) (citing *Dahnke*, *Swift & Co.*, *Lemke*, *Stafford*, *Flanagan* and *Shafer*.)

Congress has adopted the principle in legislation central to the activities of the cotton merchandising industry. 7 U.S.C. §§1, 3 (The Commodity Exchange Act): "... a transaction in respect to [cotton] ... shall be considered to be in interstate commerce if such article is part of that current of commerce usual in the commodities trade ... including ... all cases where purchase ... is ... for shipment to another State ..."

Congress has declared, as a matter of policy (7 U.S.C. §2101),: "Cotton moves in large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton and cotton products."

Congressional definition of the scope of interstate commerce is entitled to great, if not controlling, weight. *Prudential Insurance v. Benjamin*, 328 U.S. 408 (1946); *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

The principles set forth in prior cases, especially where economic and commercial relationships have been

established on the assumption of their continuing validity, should be changed by Congress, not the Court. *Flood v. Kuhn*, 407 U.S. 258 (1972). The negative consequences of the retroactive effect of a judicial change is illustrated by the traumatic experience of the cotton industry in 1973 following the decision of the Mississippi Supreme Court in this case. That decision coincided with an enormous price rise and scores of contracts were repudiated in Mississippi (there were also repudiations of lesser numbers in Alabama and Arkansas which have laws similar to Mississippi's in banning remedial qualification). Disaster was avoided only by the decisive action of the United States District Court for the Northern District of Mississippi in *Allenberg Cotton Company, Inc. v. Coleman* granting preliminary enforcement of the contracts. Many of these cases still pend.

Cotton commodity purchasing practices are substantially the same as those of other commodities. If *Dahnke* is suddenly reversed the adverse consequences suffered in Mississippi in 1973, may be duplicated in other industries in other states.

For these reasons *Dahnke* should not be reconsidered.

B. RECONSIDERATION OF *DAHNKE*.

If *Dahnke* were considered de novo its rule would still be adopted.

In addition to the retroactive burdens imposed by reversal of *Dahnke* there are prospective burdens. Under the rule sought to be applied in Mississippi, it will be necessary for any foreign corporation potentially interested in buying in Mississippi to qualify even before entering a contract. To fail to do so is to risk breach of the contract at any time after the "ink dries," without the protection of state enforcement.

Potential competition may restrain other buyers from underpaying those from whom they buy. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-74 (1964). But under the rule of the decision below, if cotton firms have not previously qualified they will not even bid in the state, for if a bid were accepted, the contract made must be instantaneously offset by sale, or hedge on the New York Cotton Exchange, and the buyer would be at the seller's mercy. If the market then went up, the farmer could enforce the contract, but if the market went down, the merchant could not enforce it against the farmer. As a result of these considerations a state having such a law would become a separate marketing area, and entrenched firms would bid for its commodities free from potential competition.

The *Dahnke* rule is also desirable because it allows the buyer to judge the legal effect of its action from the nature of the transaction, not its size. It is highly important that the parties involved be able to determine the legal effects of their actions through clearly defined rules. *Kosydar v. National Cash Register Co.*, 42 Law Week 4767 (1974). Applying the Constitutional exemption only to firms which had not done "too much" buying in Mississippi would mean abandonment of a long established, clearly defined rule for one which was completely ambiguous.

To weigh against the negative effects of abandonment of *Dahnke*, what interests of the state of Mississippi would be served? The ostensible purpose of local qualification is to insure availability of a person on whom valid process may be served. Note, *Foreign Corporations—State Boundaries for National Business*, 59 Yale L.J. 737, 743 (1959). But in this respect the statute is superfluous because today every state provides for service under long-arm statutes.

Absolute prohibition of access to the courts as a penalty for failing to qualify is a 'harsh, capricious and vindictive measure *** ... the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which has sustained the injury, but results in unjust enrichment of the debtor..." *Woods v. Interstate Realty Co.*, 337 U.S. 535 539-40 (1949) (Mr. Justice Jackson, dissenting).

In cases upholding state regulation over a claim of burdensome effect on national interests the court has found either a specific state design to correct a real problem of legitimate local concern, or little, if any, detrimental effect to the federal common market. In *Parker v. Brown*, 317 U.S. 341 (1943), the court determined that "the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action ... *** ... the national government has contributed to these efforts ... by aiding programs sponsored by the State. *** Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy." The Mississippi law is not specifically designed to correct a significant problem of real local concern. Nor does it dovetail with Congressional policy. By discouraging the practice of forward contracting it strikes at the cornerstone of the new federal farm programs established under P.L. 91-524 and P.L. 93-86 (See material at ftns. 22-45, Statement of the case).

To uphold the state action it must also appear that the local interest could not be promoted as well within a lesser impact on interstate activities. *Pike v. Bruce Church*, 397 U.S. 137 (1970). Most states have not found that an absolute enforcement bar is necessary to promote the local

interest in requiring qualification. In 42 states the statutory bar to enforcement may be removed by subsequent qualification. Certainly allowing cure of the disability would promote any legitimate state interest with a lesser impact upon interstate activities. Therefore, the Mississippi law also fails to meet the test of *Pike v. Bruce Church*.

Appellant Allenberg Cotton Company, Inc., has acted in complete good faith in a commercially reasonable manner. It has relied upon the promises of the Appellee in the contract, and upon the continuing validity of long-standing principles incorporated in statutes, the case law, and commercial practice. The abandonment of *Dahnke* would be deleterious to current federal farm programs, risk commercial upheaval, inflict hardship on cotton merchants currently seeking to enforce 1973 forward contracts, reduce competition, and would produce windfall rewards for immoral conduct. The legitimate interests of the State of Mississippi could be equally well served by other devices with a lesser impact on interstate activities, and do not require the implementation of the present "harsh, vindictive and capricious" law by this Court.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION OF THIS APPEAL

A. A CERTIFICATION BY A STATE COURT THAT IT HAS NECESSARILY DECIDED A FEDERAL QUESTION IS A SUFFICIENT SUBSTANTIATION TO SUPPORT JURISDICTION OVER THE QUESTION.

Appellant invokes the jurisdiction of the Supreme Court by appeal pursuant to 28 U.S.C. § 1257 (2), and alternatively, by application for certiorari as allowed by 28 U.S.C. §2103.

Jurisdictional Statement, p. 2. In either case a federal question must be timely presented, and it must appear that no adequate, independent state ground will support the judgment. *Murdock v. City of Memphis*, 87 U.S. 590 (1875).

The Supreme Court does not review a case from a state court which can be supported on a non-federal ground because of a fundamental concept underlying the federal system: the state courts are to be the final authorities on matters of state law, while federal courts are to have the final word on federal questions. "*Murdock* rests in large part on the fear that a contrary result would put litigants able to raise a federal question in a favorable position. They, and only they, could place their state law questions before the Supreme Court. Two systems of state law, one for those who have access to the Supreme Court and one for those who do not, might develop. Such a result would contradict the basic rationale of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), that state courts are the final expositers of state law." Greene, *Hybrid State Law in Federal Courts*, 83 Harv. L. Rev. 289, 319 (1969).

Where, however, the highest state court has certified the ground for decision as federal, there can be no danger of improper intrusion by the Supreme Court into an area of state law, nor any danger of development of a dual system of state law. "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state court disappears. *Whitney v. California*, 274 U S. 357, 360-1 (1926); *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123, 134 (1913); *Coleman v. Alabama*, 377 U.S. 127, 133 (1964)." Stern and Gressman, *Supreme Court Practice* (4th ed.) 127 (1969).

The opinion rendered by the Mississippi Supreme Court in the present case concludes "nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes, might afterward sell it in interstate commerce." Opinion of the Mississippi Supreme Court, *Jurisdictional Statement* A. 1, A. 6.

Appellee has argued that because the Mississippi statute requiring qualification of foreign corporations contains an express exemption for transacting business in interstate commerce (Mississippi Code 1942 Annotated § 5309-211(e)) the decision below should be interpreted as a decision of state law only. *Motion to Dismiss or Affirm*, *pp. 6-8.*

In part I.B. of this Brief, Appellant considers whether such an interpretation is sound. In part I.C. of this Brief, Appellant considers the jurisdictional consequences of adopting this interpretation, and whether an adequate and independent state ground for the decision is possible. Here, however, it is assumed that the opinion below had rendered the record ambiguous regarding whether a federal question was raised, and the effect of the certificate obtained is considered.

Since the opinion below neither stated that the interstate commerce exemption in the Mississippi statute was considered coextensive with the Constitutional exemption, nor stated that it was not, Appellant applied to the Mississippi Supreme Court for a certificate clarifying the record. Appellant presented the Mississippi Supreme Court a draft certificate prepared following the wording of the certificate which was accepted as sufficient in *Cincinnati, P.B.S. & R. Packet Co. v. Bay*, 200 U.S. 179 (1905). This is also the form printed for the assistance of counsel in Stern &

Gresman, *Supreme Court Practice* (4th ed.) 676 (1969). The certificate obtained by the Appellant, like the certificate obtained in *Cincinnati, P.B.S. & P. Packet Co. v. Bay*, was physically signed by one justice of the state supreme court and made a part of the record.

The Appellee has asserted that this certificate, having been *signed* by only one justice, is not conclusive. *Motion to Dismiss or Affirm*, p. 5. This argument elevates form over substance to a ridiculous degree. Appellee presumably would require that the signatures of all five justices of the Mississippi Supreme Court appear on the document.

The certificate obtained shows on its face that it is the certificate of the *court*. The language of the certificate used to express this conclusion is the language used in *Cincinnati, etc. v. Bay*, to-wit: "[On motion of (name of party)] this court in addition to the orders made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry of reversal heretofore rendered and made herein . . . " Compare *Cincinnati, etc. v. Bay*, with Order Certifying Issues Decided, *Jurisdictional Statement* pp. A. 12-A. 13.

In addition, Julia H. Kendrick, Clerk of the Mississippi Supreme Court has certified the copy of the certificate which is reprinted in the *Jurisdictional Statement* as: "a true and correct copy of the Order Certifying Issues Decided *by the Court in the case of* Ben E. Pittman versus Allenberg Cotton Company, Inc., No. 47,037 — as the same appears *of record* on file in my office. Given my hand, *with the seal of the said court affixed*, at office, in the City of Jackson, Mississippi, this the 17th day of August, A.D. 1973. /s/ Julia H. Kendrick, Supreme Court Clerk." (emphasis added) *Jurisdictional Statement*, p. A. 12. It would appear that either the signature of Robert G. Gillespie. Chief Justice of the Mississippi Supreme Court, or

the signature of Julia H. Kendrick, Clerk of that Court, would be sufficient to establish that the action was in fact taken by the Court.

Once it is established that the certificate in this case is what it purports to be, a certificate by the court, what effect should it be given?

The reason for obtaining the certificate is to avoid the chance of intrusion by the Supreme Court into areas of state law. A certificate that the decision of the federal question was necessary to the judgment is a certification that state law was not independently controlling. If the Supreme Court looks behind the certificate to disagree with the state court on this point, it intrudes into areas which should be left to the state.

Moreover, there is no reason to give less credence to a certificate of a state court made a part of the record and the judgment, than to the opinion and judgment of the court.

> "That rule, we feel, should state that a certificate of a state court is conclusive as to whether a federal question has been raised and decided. We cannot see any reason for distinguishing between an opinion of a state court and a judicial expression taking some other form. Since the Supreme Court will not inquire whether a federal question has been properly presented when the opinion of the highest state court demonstrates that it has been considered, it should not give less weight to a state court certificate, made part of the record."

Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111, 117 (1960).

In *Lynumn v. Illinois*, 368 U.S. 908, 372 U.S. 528, 535-536 (1963) where the Constitutional question did not

appear to have been timely raised below, a certificate from the Illinois Supreme Court was held conclusive to establish the jurisdiction of the United States Supreme Court. This sound conclusion is required by the principle that further inquiry into how and when a federal question was raised is uncalled for once it appears that the highest state court has passed on it. ***Raley v. Ohio***, 360 U.S. 423, 436 (1959); ***Charleston Federal Savings & Loan Association v. Alderson***, 324 U.S. 182, 185-6 (1945).

B. WHERE A STATE STATUTE INCORPORATES A CONSTITUTIONALLY REQUIRED EXEMPTION, AND THE QUESTION OF APPLICATION OF THE EXEMPTION WAS DECIDED BELOW, THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE QUESTION.

The Mississippi statute requiring qualification of foreign corporations expressly incorprates the Constitutionally required exemption for foreign corporation whose only activity in Mississippi is 'transacting any business in interstate commerce." Mississippi Code 1942 Annotated § 5309-221(e) (Supp. 1972).

This exemption for interstate commerce was taken from the Model Business Corporation Act § 106, 2d Par. This is admitted by Appellee. ***Motion to Dismiss or Affirm***, p. 2, ftn. 3.

The "interstate commerce" exemption of the Model Business Corporation Act § 106, 2d Par., is intended to conform the act to the Constitutional mandate of ***International Text Book Co. v. Pigg***, 217 U.S. 91 (1909); ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282 (1921); ***Union Brokerage Co. v. Jensen***, 322 U.S. 202 (1944); and ***Eli Lilly & Company v. Sav-On-Drugs, Inc.***, 366 U.S. 276

(1960). Model Business Corporation Act Annotated (2nd Ed. 1971) § 106. 2d Par., ¶4.05.

In a case decided since the instant case, the United States District Court for the Northern District of Mississippi, sitting as a state court in a diversity action raising identical substantive issues, held that "the [Mississippi] state legislature intended to adopt the federal constitutional standard when it enacted the interstate commerce exception to the qualification requirements. Therefore, a Mississippi court, when determining what activities constitute interstate commerce within the contemplation of the exempting statute, would consider itself bound by the express language of § 79-3-289 [Formerly Mississippi Code 1942 Annotated § 5309-312 (Supp. 1972). The Mississippi statutes were recodified in 1973.] of the Mississippi Code to apply the federal standard, if indeed there is any difference between the state and federal standards." ***Allenberg Cotton Company, Inc. v. Coleman***, 369 F. Supp. 426 (N.D. Miss. 1974).

If this conclusion were not correct, these words of the Mississippi qualification statute would be meaningless: "The provisions of this act shall apply to commerce with foreign nations and among the several states only in so far as the same may be permitted under the provisions of the Constitution of the United States." Mississippi Code 1942 Annotated § 5309-312 (Supp. 1972).

It is conceded by Appellee (see ***Motion to Dismiss or Affirm***, pp. 7-10), as it must be, that the question whether Appellant's activities were within the statutory exception for "interstate commerce" was fully argued, considered, and decided in the proceedings below. Therefore, the record presents a case in which a Constitutional question. incorporated by reference within state law, was raised and decided below.

"Where the meaning of a state statute depends upon federal law, incorporated by it, a construction of that state statute, interpreting federal law, presents a federal question for the Supreme Court and is not a state ground of decision." Robertson & Kirkham, ***Jurisdiction of the Supreme Court of the United States***, § 99 (Wolfson & Kurland ed. 1951); ***Standard Oil Company v. Johnson***, 316 U.S. 481 (1942); ***Smith v. Kansas City Title & Trust Co.***, 255 U.S. 180 (1921); ***State Tax Commission v. Van Cott***, 306 U.S. 511 (1939).

"There are various ways in which the validity of a state statute may be drawn into question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time and if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." ***New York ex rel. Bryant v. Zimmerman***, 278 U.S. 63 (1928).

The law of jurisdiction raises problems which are often technical in nature. But underlying their solutions are matters of substance in the practical working of the dual system and in the effective conduct of the business of the Supreme Court. The solution to these problems should not depend upon talismanic words or rigid formulas. The duties of the Supreme Court should not hang on a thread of mere verbalism.

Appellee's argument that this case may not be reviewed reduces to the proposition: 'It is not reviewable because it was not expressly stated to the court below (prior to the Petition for Rehearing) that if it erred in applying the Constitutionally required exemption contained in the statute,

it would also err in applying the Constitutional exemption which existed independent of the statute.' Certainly the empty formalism of this argument cannot restrain the Supreme Court from reviewing the lower court's conclusion on precisely the same Constitutional issue which was decided in the lower court.

If the exemption recognized by § 5309-221(e) had not been expressed in terms in the statute, the Mississippi court would, nevertheless, have been required to recognize it if asserted by Appellee. In such a case, the Supreme Court would have jurisdiction to review the lower court's conclusions on that issue. Where the statute in terms recognizes the exemption, and the issue of its application to Appellee has been joined, the result should not be otherwise.

The dual federal system has produced many varying devices to harmonize our two systems of law. One such device is the incorporation of federal law by reference in state statutes. See Koenig, ***Federal and State Cooperation Under the Constitution***, 36 Mich. L. Rev. 752 (1938). The Supreme Court has recognized that a federal question is presented in a case in which the meaning of a state statute turns on a question of an incorporated federal rule, even where there was no compulsion that the federal rule be incorporated. When this conclusion was adopted there was criticism of it on the ground that such a case would present only a question of state law, since the state was free to adopt the federal rule or not as it saw fit. ***Smith v. Kansas City Title & Trust Co.***, supra, at 214 (Holmes, J., dissenting). However, in the instant case not even this objection can be raised since the state of Mississippi had no choice but to recognize, either legislatively or judicially, the exemption for interstate commerce.

Speaking of the Mississippi statute in ***Allenberg Cotton Co., Inc. v. Coleman***, Judge Smith said, "It would be unrealistic to conclude that the interstate commerce exception was enacted as a voluntary exercise of legislative grace. It is a recognition of a constraint imposed upon state power by the Commerce Clause."

The instant case is similar to ***Perkins v. Benquet Consolidated Mining Company***, 342 U.S. 437 (1952). In ***Perkins***, the Ohio Supreme Court had held that a certain foreign corporation was not subject to service of process in Ohio. The official opinion of the Ohio court did not indicate whether that court had rested its decision on Ohio law or on the Fourteenth Amendment. However, based on comments made in a concurring opinion, (although these were admittedly not definitive) the United States Supreme Court concluded that Ohio had intended to authorize extra-territorial service of process to the extent permitted by due process. The Supreme Court took jurisdiction because "to allow the judgment to stand as it is would risk an affirmation of a decision which ***might*** have been decided differently if the court below had felt free, under our decisions, to do so." ***Perkins***, at 443 (emphasis added).

In the present case, no speculation on the outcome is necessary. Clearly, if the Constitutional scope of permissible state authority were less than that assumed by the Mississippi court, this case would have been decided differently. Nor is speculation on the intended scope of state authority necessary since legislative history (the Model Business Corporation Act), recent precedent (***Allenberg Cotton Company, Inc. v. Coleman***), and the Mississippi qualification statute itself (§ 5309-312) show the intent that the state qualification requirement be coextensive with that required by the Commerce Clause.

There can be no question that insofar as may be relevant to this case, the two exemptions must be coextensive.

Although the state exemption might be broader than the Constitutional, the Supremacy Clause requires that the exemption given by the state not be narrower. If the Constitutional exemption applied to Allenberg, the state exemption must also. No certificate is necessary to show that by failing to extend the state exemption to Allenberg the court below must have also believed that the Constitutional exemption did not apply.

In this case, therefore, the two exemptions are coextensive. To address one question is to address the other. Both the lower court and the Supreme Court have the same responsibility in determining whether Allenberg's activities are protected by the exemption. However, the Supreme Court's decision is paramount. Mere semantics should not prevent the final arbiter of the scope of that exemption from considering whether it was properly applied in the court below.

Speaking of the authority of the Supreme Court to review cases like the present, one commentator has reached these conclusions: "[In cases where the state, either explicitly by statute or by judicial interpretation, decides that its authority will be exercised to the limits of Constitutional power] federal law is not simply being borrowed by the state to serve its own purposes. It is independently relevant in the fact situations presented. It comes into play only if the state attempts to sweep too broadly. But assumption of federal jurisdiction does not thrust the federal courts into areas reserved to the states. No Constitutional barrier therefore prohibits Supreme Court review. And, as in the earlier cases, the language of the jurisdictional statute is sufficiently broad—one can find a federal right being 'set up or claimed' whenever a state decision is made to turn upon an interpretation of the Constitution or the laws of the United States. The court

is therefore fully justified in assuming jurisdiction." Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 315 (1969).

These considerations may lead the Supreme Court to the procedural conclusion that this "appeal" be considered upon writ of certiorari, 28 U.S.C. § 1257 (3), on the ground that a federal right has been "set up or claimed." It is settled that an appeal may be treated as certiorari, *Longest v. Langsford*, 274 U.S. 499 (1927), and in its *Jurisdictional Statement*, Appellant has alternatively prayed for certiorari.

These considerations may also lead to the procedural conclusion that, after hearing the case on the merits, should the Supreme Court conclude that the state court has misconstrued the scope of the Constitutional exemption incorporated in state law. it should reverse only that conclusion, and remand the case to the Mississippi court for further consistent proceedings as was done in *Perkins*, *Standard Oil Co.*, and *Van Cott*. However, Appellant would suggest that these procedural conclusions, while not opposed by Appellant, would be inappropriate.

The Constitutional exemption invoked by Appellant applies of its own force as a limitation upon state power. Although the legislature of Mississippi has incorporated it into its statute as a measure of the scope of the legal obligation imposed upon foreign corporations to qualify, the Mississippi court has refused to apply the exemption to Appellant, and has imposed the obligation to qualify. Appellant contends that the state application of the obligation to qualify has not been consistent with the Commerce Clause. The application of a statute by a state court is itself state law, the validity of which may be drawn into question on the ground of its repugnance to the Constitution. A challenge to the application of the state law on the ground of its repugnance to the Constitution is properly brought by

appeal. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U S. 282 (1921), and see dissent of Brandeis, J.; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61, n.3. Thus appeal is the proper vehicle for this case.

Remand is unnecessary whether the case is heard by appeal or by certiorari. If the Constitutional challenge is sustained, ipso facto, the state application of law is struck down as inconsistent with the Commerce Clause. *Dahnke*. Complete disposition of the case is accomplished by the ruling on the Constitutional issue because the outer limit of the authority of the state statute to impose qualification requirements is the beginning of the Constitutional exemption. Since the case may be concluded by the determination of the scope of the Constitutional exemption, remanding the case for application of the state law would be a useless act.

The compulsory and final effect of a reversal in this case distinguishes it from cases where final determination of the controversy required the further application of state law, e.g. *Perkins*. In the later case, remand is appropriate. In the instant case the Constitutional exemption resolves the case without assistance by state law. It is self-executing, and remand is unnecessary. *Evans v. Newton*, 382 U.S. 296 (1966).

C. A CHALLENGE TO STATE INTERFERENCE WITH CONSTITUTIONAL RIGHTS IS TIMELY ASSERTED IN A PETITION FOR REHEARING WHERE THAT VEHICLE PRESENTED THE FIRST OPPORTUNITY FOR THAT CHALLENGE AFTER ACTUAL INTERFERENCE WITH SUCH RIGHTS.

Although it makes no sense to assume that the interstate commerce exemption in § 5309-211(e) is merely an

independent creature of state law, that assumption is essential to sustain Appellee's argument that the Constitutional issue was not timely raised below.

However, if this illogical assumption is made it would still be the case that the Constitutional issue was timely raised.

It is admitted by Appellee that a Constitutional challenge to the Mississippi Supreme Court decision was made in the Petition for Rehearing in which the argument was made that the failure to exempt Appellant from the qualification requirements violated the Commerce Clause, and *Dahnke* was cited. *Motion to Dismiss or Affirm*, p. 10. It is also admitted that since Appellant Allenberg had won in the trial court it was not required, under Mississippi practice, to delineate the issues raised by the case in the Mississippi Supreme Court. *Motion to Dismiss or Affirm*, p. 6. The Rules of the Mississippi Supreme Court make no such provision.

In these procedural aspects, the Rules of the Mississippi Supreme Court reflect the normal understanding of the procedure and function of appellate courts. In an appeal it is the responsibility of the Appellant to challenge the result below. The Appellee is required only to respond, not to mount its own challenge to hypothetical results in the appellate court. The Appellee is entitled to assume its Constitutional rights will be honored. Until there is actual interference with its Constitutional rights, no insistence upon them is necessary, nor does such a hypothetical insistence present a justiciable issue. *Poe v. Ullman*, 367 U.S. 497 (1961). Any other rule would obscure the issues before the court, and make the preservation of Constitutional arguments depend solely upon the imagination of counsel.

"The power of courts . . . to pass upon the Constitutionality of acts . . . arises only when the interests of litigants requires the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." ***United Public Workers v. Mitchell***, 330 U.S. 75 (1947).

Allenberg Cotton Company, Inc., having been exempted by the trial court from the qualification requirement, could not have assailed that action in the Mississippi Supreme Court as having violated the Constitution of the United States. No application of the Mississippi qualification statute encroached upon Allenberg's rights until the action of the Mississippi Supreme Court. A litigant is not required to anticipate deprivation of Constitutional rights or invoke their protection in advance of actual interference. ***Missouri ex rel. Missouri Insurance Co. v. Gehner***, 281 U.S. 313 (1930); ***Brinkerhoff-Faris Trust and Savings Co. v. Hill***, 281 U.S. 673 (1930); ***Saunders v. Shaw***, 244 U.S. 317 (1917).

In *Gehner* a Missouri Board of Equalization assessed a company's taxable personal property at $50,000.00. The Board excluded from the assessment the value of certain United States bonds. The company appealed the assessment of $50,000.00. On appeal, the Missouri Supreme Court held, inter alia, that the value of the bonds should be included in the assessment. Then in its Motion for Rehearing the company first challenged the inclusion of the United States bonds in the assessment as a violation of the Constitution and federal statutes. The motion also made other arguments. In response to the motion, the court modified the details of its calculations in particulars not relevant to the federal questions and did not refer to the federal questions. The United States Supreme Court took jurisdiction on appeal holding "here the company, at the first opportunity, invoked the protection of the Federal

Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States." *Gehner*, supra, at 320.

In the instant case, if the § 5309-211(e) exemption for interstate commerce is a Constitutional exemption, the question of its application is a federal question reviewable by the Supreme Court for the reasons set forth in Part I. B. of this Brief. If application of the exemption presents only a question of state law, since actual interference must precede the invocation of Constitutional protection, the assertion of those rights in the Petition for Rehearing was timely.

The rule requiring actual interference is the sound product of judicial restraint. Without such a rule, litigants would needlessly obfuscate the issues before appellate courts with imaginary challenges to hypothetical decisions. Of course, in Commerce Clause cases, the actual interference rule may produce a Constitutional confrontation somewhat later in the day than usual, since there may be no interference with Constitutional rights until the decision of the state court. An extreme example of this is presented in ***Corn Products Refining Co. v. Eddy***, 249 U.S. 428, 432 (1919):

> "We turn to the questions raised under the commerce clause and the act of Congress.
>
> "Although the supreme court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered

> for sale in domestic commerce, but also while in the hands of the importing dealers for sale in the original packages, hence, in contemplation of law, still in the course of commerce from state to state. The silence of the supreme court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state."

The Supreme Court then went on to consider the Commerce Clause question in the *Corn Products* case.

Under *Corn Products*, it would seem that where there has been no interference with rights under the Commerce Clause until the state supreme court decision, it is not even necessary to raise the Commerce Clause question below (such as by Petition for Rehearing). However, it is not necessary to decide this question in the present case because the question was raised below, and the question was raised in a timely manner at the first opportunity after interference with Constitutional protections.

The reasons given here demonstrate why the opinion below, however interpreted, cannot be taken to establish an adequate and independent state ground for the decision, and that, therefore, the rule of *Herb v. Pitcairn*, 324 U.S. 117, 128 (1945), does not apply. Here there was only one relevant decision: that Appellant was not transacting business in interstate commerce. If this was solely a decision of state law, the decision itself established, for the first time in the case, an actual interference with Appellant's Constitutional protections under the Commerce Clause. No adequate, independent state ground could protect the decision from Constitutional challenge. The

reasons given for the decision are irrelevant. As in *Corn Products*, the effect of the decision, which constituted actual interference, was all that mattered. Appellant then asserted in the Petition for Rehearing that the application of state law to it conflicted with the Commerce Clause. This was all that was necessary (possibly more than was necessary) to preserve the ability of Appellant to challenge the Constitutionality of the decision in the United States Supreme Court.

II. MISSISSIPPI'S REFUSAL TO ALLOW A FOREIGN CORPORATION TO ENFORCE ITS CONTRACT WITH A MISSISSIPPI RESIDENT FOR THE PURCHASE OF COTTON TO BE SHIPPED FROM THE STATE IS REPUGNANT TO THE COMMERCE CLAUSE.

A. APPLICATION OF THE *DAHNKE* PRINCIPLE.

In this case, Allenberg Cotton Company, Inc., a cotton merchant incorporated in Tennessee, which ~~buys~~ buys cotton in many states, and resells in many states and in foreign countries, was prohibited from enforcing its cotton purchase contract in Mississippi because it had not qualified to do business there. Under Mississippi Code 1942 Annotated, § 5309-239, as applied to Allenberg by the Mississippi Supreme Court, making Allenberg's contract for the purchase of cotton was deemed to be the transaction of business in Mississippi. Since Allenberg did not have a certificate of authority it was prohibited from maintaining any action in any Mississippi court to enforce rights arising out of that contract. It is settled, as a matter of Mississippi law, and the Mississippi court reaffirmed in this case, that if a foreign corporation enters into a contract in Mississippi and a cause of action arises under that contract, its qualification after the cause of action has arisen will not lift the prohibition. Having been unqualified at the

crucial time, it is forever barred from enforcing its contract. (Opinion of Mississippi Supreme Court, *Jurisdictional Statement*, p. A. 6).

The prohibition from use of the state courts also applies to the federal courts. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).

This case is controlled by *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 882 (1921) and other decisions, the rule of which was not applied by the Mississippi Supreme Court. These cases established and applied the rule that purchases of raw agricultural commodities in one state for shipment out of that state are "interstate commerce" and therefore in a category which Congress may regulate, and which may not, in some respects, be regulated by the state. In this case the State of Mississippi has refused to give access to her courts to a buyer seeking to enforce such a purchase contract. In *Dahnke*, in an almost identical transaction, the United States Supreme Court held that such refusal (in that case by Kentucky) was unlawful, concluding (*Dahnke*, at 292-93):

> "For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."

In *Dahnke*, the Kentucky Supreme Court found the facts of the case to be as follows (*Bondurant v. Dahnke-Walker Milling Co.*, 195 S.W. 139, 140 (Ken. 1917), affirmed after retrial 195 S.W. 76 (Ken. 1917)):

> "There were some minor differences in the evidence, as to the terms of the contract, but the undisputed facts

proven, about which there were no contradictions, show that the terms of the contract were that about the 15th day of June, 1915, or a few days thereafter, the appellant and John Creed, an agent of appellee, entered into the contract sued upon at Hickman, Ky.; that both appellant and Creed were citizens of Kentucky; that appellant agreed to sell and deliver the crop of wheat grown by him upon his lands, in this state, during the year 1915, to appellee or to its agent, on board the cars at Hickman, Ky., within a reasonable time after same should be threshed, not later than the 10th day of August, and appellee, or its agent, was at the time of such delivery and at the place of delivery and concurrent therewith to pay to appellant the contract price for the wheat, which was $1.04 per bushel. The appellant testified that Creed did not represent to him that he was making the contract for or on behalf of appellee, and the testimony of Creed fails to show that he disclosed his principal, although he makes the statement that appellant knew in what capacity he was contracting. This difference, however, is not important. The evidence does not disclose that the contract contained any stipulation that the wheat was to be consigned to any one or to any place by appellant when put on board the cars, and hence it must be assumed that the appellee, when the wheat was delivered, might consign it to such person or to such destination or to do with it, as it saw fit."

The Kentucky Supreme Court then applied the following analysis to the facts:

"An analysis of the terms of the contract shows that the wheat was purchased in Kentucky, to be delivered and paid for in Kentucky, and at a time when the wheat and all parties were in Kentucky. The title to the property, under the contract, was to pass from the vendor to the vendee in Kentucky. No further thing

was to occur or to be performed beyond the boundary line of the state of Kentucky to make a complete compliance with the contract, nor had any negotiations been theretofore carried on with reference to the contract between the appellant and appellee whilst the latter was in the state of Tennessee. The wheat was not to be consigned for delivery to any point or to any person outside of the state, so far as the terms of the contract require. The appellee, when it should have received and paid for the what in this state, might resell it in this state, or ship it to such point as it desired, or otherwise dispose of it in the state, according to its pleasure. There was nothing in the terms of the contract, which required the consignment or shipment of the wheat from Kentucky to another state in order to make a full compliance with it.

"How can this contract be distinguished from one entered into in this state, between citizens of this state, for the sale and delivery of a product then in this state? The only distinguishing feature would be that one of the parties was a citizen of a state other than the state of Kentucky. Such a fact, however, could not convert a transaction into a transaction in interstate commerce which was not otherwise an interstate transaction.

* * *

"Having arrived at the conlcusion that the contract sued on was one which had relation to doing business in the state of Kentucky, and not a transaction in interstate commerce, and it appearing that the appellee had never complied with the requirement of section 571, supra, which was a condition precedent to its right to do business within this state, the contract was unlawful, and the court should not have given its assistance to a recovery for a breach of it, but should have sustained

the motion for a directed verdict. With this view of the case, it is unnecessary to consider any other questions raised on the appeal."

In the instant case, the Mississippi Supreme Court. applied the same analysis and reached the same conclusions as had the Kentucky court in 1917 (Opinion of the Mississippi Supreme Court, *Jurisdictional Statement*, p. A. 4-A. 6):

"It is apparent that these transactions of Allenberg in each case, including that with Pittman, took place wholly in Mississippi. The contract was negotiated in Mississippi, executed in Mississippi, the cotton was produced in Mississippi, delivered to Allenberg at the warehouse in Mississippi, and payment was made to the producer in Mississippi. All interest of the producer in the cotton terminated finally upon delivery to Allenberg at the warehouse in Marks. The fact that afterward Allenberg might or might not sell the cotton in interstate commerce is irrelevant to the issue here, as the Mississippi transaction had been completed and the cotton then belonged exclusively to Allenberg, to be disposed of as it saw fit, at its sole election and discretion.

* * *

"The affixation of Allenberg's signature in Memphis to a contract form before it was sent or brought to Marks for execution by the producer in nowise made it a contract prior to its acceptance and execution by the producer at Marks. Nor is the transaction converted into interstate commerce because, after the cotton had been delivered to Allenberg at the warehouse in Marks and title thereto had become vested in Allenberg in Mississippi, Allenberg, at its own election and for its own purposes. might afterward sell it in interstate commerce."

On appeal, of the Kentucky case in 1921, the United State Supreme Court established and applied the following rule of constitutional law (*Dahnke*, at 291-292):

"[After reciting the principle with regard to sales.] On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. This has been recognized in many decisions construing the commerce clause. *** Buying and selling and the transportation incident thereto constitute commerce." In *United States v. E. K. Knight Co.*, 156 U.S. 1, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic' between the citizens or inhabitants of different states, and includes not only the transportation of persons and property ... but also the purchase, sale and exchange of commodities. *** A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. [Citing, inter alia, *Crutcher v. Kentucky*, 141 U.S. 47; *Western Union Tel. Co. v. Kansas*, 216 U.S. 1.]

The principle, that a purchase or sale for shipment is interstate commerce, which was enunciated in *Dahnke*, was the central principle of the following cases decided prior to *Dahnke*: *International Text Book Co. v. Pigg*, 217 U.S. 91 (1910); *Sioux Remedy Co. v. Cope*, 235 U.S.

197 (1914); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Swift & Co. v. United States*, 196 U.S. 365 (1905); *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).

This principle is also the central principle of the following cases, decided subsequent to *Dahnke*: *Lemke v. Farmer's Grain Co.*, 258 U.S. 51 (1922); *Stafford v. Wallace*, 258 U.S. 495 (1922); *Shafer v. Farmer's Grain Company*, 268 U.S. 187 (1925); *Flanagan v. Federal Coal Company*, 267 U.S. 222 (1925); *Mandeville Island Farms v. American Crystal Sugar Company*, 334 U.S. 219 (1947); *Furst v. Brewster*, 282 U.S. 493 (1921); *United States v. Rock Royal Co-op*, 307 U.S 533 (1939); *H. P. Hood & Sons v. DuMond*, 336 U S. 525 (1949); *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332 (8th Cir. 1971).

That principle is incorporated in statutory as well as case law. See, e.g. 7 U.S.C. §§ 1, 3 (Commodity Exchange Act, discussed below in this brief); and 7 U.S.C. § 183 (Packers and Stockyards Act).

The Appellee seeks to distinguish *Dahnke* in six ways (*Motion to Dismiss or Affirm*, p. 14).

(1) He contended that the contract in *Dahnke* specified delivery outside of Kentucky.

This is not correct. Both the Kentucky Supreme Court and the United States Supreme Court expressly found that the contract called for delivery in Kentucky (*Dahnke*, at 286; *Dahnke-State Opinion*, 195 SW at 140). After filing the *Motion to Dismiss or Affirm* the Appellee telegraphed the Clerk to omit this contention.

(2) and (6) In *Dahnke* the contract called for delivery f.o.b. cars, whereas in the instant case delivery was to be accomplished by delivery of negotiable warehouse re-

ceipts representing the cotton which had been stored by the farmer. This is essentially the same contention as his point (6), in which the Appellee points out that in *Dahnke* the grain which was the subject of the contract was not warehoused before delivery whereas his cotton was.

This difference stems from a difference in the handling of the two commodities in the particular cases. Except in exceptional circumstances, cotton cannot be shipped as it comes from the fields. Each bale, even from the same farm, "is a different quality due to variations in soil, time of planting, harvesting, changes in weather, variety of cotton planted, and many other causes. A vital function then of cotton merchandisers is to assemble these odd-lot bales and pool them with other bales of like qualities [customarily of 100 bales] to meet the requirements of spinners [cotton mills] wherever they are." A. B. Cox, *Cotton - Supply, Demand & Merchandising*, p. 4 (quoted in Statement of the Case at ftn. 4). Grouping is done by the cotton merchant's employees in its central office. The merchant then issues shipping orders to the warehouse, directing the warehouse which 100 bales to load on cars to be shipped to a given mill. *Cotton - Demand, Supply & Merchandising*, quoted at ftns. 7-8, Statement of the Case. This sorting and grouping function is essential because each cotton mill has designed its machinery to handle a specific grade and quality of cotton. *Cotton - Demand, Supply & Merchandising*, quoted at ftns. 5-6, Statement of the Case.

The cotton farmer warehouses the cotton, and delivers negotiable receipts to obtain payment. Assuming that owning cotton in warehouses during the period of time necessary to group it into shipping lots is "intrastate," this "intrastate" aspect cannot be separated from the interstate sale and purchase. It is common to virtually

all sales of cotton by Mississippians to persons outside the state. If the out of state merchant discontinued this practice, it would also be required to withdraw from the interstate business. It is not economically feasible to ship cotton from Mississippi before it is sorted in a warehouse, because its destination cannot be determined until it is grouped into even running lots. An otherwise interstate transaction will not be deemed to be intrastate in character because of intrastate aspects which are essential to the interstate transaction and which cannot be separated from it. *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384 (1935); *Sprout v. South Bend*, 277 U.S. 163 (1928); *LeLoup v. Port of Mobile*, 127 U.S. 640 (1884); *Eli Lilly & Co. v. Sav-On-Drugs*, 366 U.S. 276 (1961).

The argument propounded by Appellee was rejected in *Chicago Board of Trade v. Olson*, 262 U.S. 1 (1923). These transactions on the floor of the Chicago Board of Trade were held interstate commerce, despite the argument that the subject of the sales was wheat which was not moving, but was held in designated warehouses.

It would certainly be anomalous to determine that sales of cotton in public warehouses are not interstate commerce. Cotton is one of the nation's largest and most important crops. It must be warehoused and grouped before it is useful to consuming mills. If it is held that the warehousing aspect of the transaction makes the matter intrastate, then almost every sale of cotton in the United States is intrastate.

(3) In *Dahnke*, Appellee asserts that the out of state mill had established a practice of buying in Kentucky; whereas the Allenberg-Pittman contract was a "first arrangement." To the extent it is relevant, this point benefits Allenberg since it indicates Allenberg was more removed from the seller than the buyer in the *Dahnke* case.

However, the relevant point is that in *Dahnke* the purchase was not an isolated transaction, since the buyer bought large amounts of wheat in Kentucky in the year of the contract as well as in prior years.

Appellee also states in (3) that Covington, the local cotton broker, "did not know what would happen to the cotton." Covington's testimony meant he did not know to which states or foreign countries the cotton was going. He did not know that it would go somewhere—he testified: "Well, its shipped to foreign countries, different mills. Wherever they want to sell it. Lots of it in Marks [Mississippi] went to Japan." A. 60.

(4) Appellee asserts that in *Dahnke* the selling farmer knew the wheat was leaving the state, whereas Pittman had "no knowledge." To the contrary, the records show the reverse is true. In *Dahnke* the Kentucky Supreme Court found that: "The [farmer] testified that Creed [the local wheat buyer] did not represent to him that he was making the contract for or on behalf of [the out of state buyer], and the testimony of Creed fails to show that he disclosed his principal." *Dahnke-State Opinion*, p. 140. The opinion in the United States Supreme Court does not mention the farmer's knowledge, or lack of it.

In the instant case the contract shows on its face: "Buyer: Allenberg Cotton Company, 104 S. Front Street, P. O. Box 254, Memphis, Tennessee." (A. 5) The broker, Covington, testified that by telephone he relayed Pittman's offer to sell at 22¢ per pound to Allenberg's office in Memphis, and that after negotiations over the telephone, a price was agreed upon, through him, between Pittman and Allenberg (A. 103). Pittman never denied knowledge of the identity of the party with whom he was contracting. To the contrary, he testified Covington called him to tell him Jerry Hill (of the Allenberg Memphis office)

had delivered the contract documents to Covington's office (A. 83). He also never denied knowing that the cotton would be shipped from the state (A. 82-A. 86).

(5) Appellee contends that in *Dahnke* there was "transportation involved," but it was "not involved" in the instant case.

On the record in *Dahnke*, the transportation there involved was only that contemplated by the buyer. The seller contended, and the Court accepted his contention, that as far as he was aware, the sale was only between himself and Creed, who was also a local resident.

In the instant case Pittman knew he was selling to a foreign corporation and did not deny knowledge of its destination out of state. Of course, under *Dahnke*, his knowledge or lack of it is irrelevant; the record on this point in *Dahnke* establishes only that the buyer intended to ship the wheat out of state, and no more. ("The wheat was not to be consigned for delivery to any point or to any person outside of the state, so far as the terms of the contract require." *Dahnke-State Opinion*, at 140). In the instant case, Allenberg also bought the cotton to ship it out of state. (A. 78, A. 79, A. 96). In fact, virtually every bale of cotton produced in Mississippi leaves the state because there is no significant milling activity in that state. See ftn. 3, Statement of the Case; and *Allenberg Cotton Company, Inc, v. Coleman*, 369 F. Supp. 426, reprinted in Supplemental Brief of Appellant Containing New Case Authority, p. 17a. Thus the relevant facts in the instant case and in *Dahnke* are identical. In each case the buyer intended to ship the commodity out of the state. The additional circumstance, that the seller here knew he was selling to an out of state company, makes the present case even stronger than *Dahnke*.

The foregoing shows *Dahnke* and the instant case to be on all fours in every relevant particular.

Dahnke, however, is more than a particular decision on a given state of facts. It is a key principle. It is a part of a series of judicial and legislative decisions protecting free access to the agricultural products of the nation. In this it is a central principle in the framework of commercial relations and legal decisions by which is established the federal free trade unit intended by the authors of the Constitution.

Central to the vision of the founding fathers was the creation of a national market for commodities. Hamilton expressed the idea in the Federalist, No. 11, at 52:

"FREEDOM OF INTERSTATE COMMERCE FAVORABLE TO ALL STATES

> "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails from a bad harvest or unproductive crop, it can call to its aid the staple of another. *** The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions."

In *Shafer v. Farmer's Grain Company*, wheat was purchased in North Dakota at some 2,200 country grain elevators

by North Dakota buyers who were agents of the owners or operators of the elevators. Both buyers and sellers were located in the state. The contracts were made and performed wholly in the state. The sale of the wheat was complete upon delivery at the grain elevator. It was then held there by the buyers until carload lots were assembled. 90% of the wheat was purchased with the intent to resell and ship to markets outside the state.

A North Dakota statute imposed licensing and other requirements on the grain buyers, but the Court struck down the statute as inimicable to the Commerce Clause, saying, "Buying for shipment, and shipping, to markets in other state, when conducted as before shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping. We so held in *Lemke v. Farmer's Grain Co.*, 258 U.S. 50, following and applying the principle of prior cases. Later cases have given effect to the same principle. *Stafford v. Wallace*, 258 U.S. 495.

"Wheat ... is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right ..." *Shafer*, at 198-99.

In their central aspects, these leading cases from an earlier day, *Dahnke*, *Lemke*, *Shafer*, *Robbins*, *Stafford*, and others, consistently espouse the overriding goal of protecting and fostering a national common market in commodities. Although no one could gainsay that judicial philosophy and approach have changed since their time, in this basic aspect these decisions form a consistent link between the authors of the Constitution, and the authors of more recent Commerce Clause decisions, particularly those since the great depression. The history of these ideas was reviewed by Mr. Justice Jackson in 1949 in *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949).

In *Hood* the State of New York had denied a license to H. P. Hood & Sons, Inc., to establish a milk receiving depot in New York. Hood was a milk distributor, located in Boston and incorporated in Massachusetts. The State of New York asserted significant local interest in preventing further competition in the particular milk marketing area involved. Despite the admitted importance of the state interest asserted (the Court found that production and distribution of milk were intimately related to public health and welfare, and that the eccentric economy of the industry required economic controls), the Court did not allow the statute to stand. The opinion of the Court reflects the historic concern for the protection of the national free trade area:

> "When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. '. . . each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.' Story, The Constitution, §§ 259, 260. See Fiske, The Critical Period of American History, 144; Warren, The Making of the Constitution, 567. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony' and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states. Documents, Formation

of the Union, H.R. Doc. No. 398, 12 H. Doc., 69th Cong., 1st Sess., p. 38.

"The desire of the Forefathers to federalize regulations of foreign and interstate commerce stands in sharp contrast to their jealous preservation of the state's power over its internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relinquished ... ***

"[The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units... ***

"The material success that has come to inhabitants of the states which make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movements of goods against local burdens and repressions. We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun?

* * *

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign

state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

The continuity of thought running throughout the Constituion, the early cases and the post-depression cases, had been the subject of other commentary:

"The Constitution empowers Congress to regulate "commerce among the several states." * * * The early cases and a great number of later ones had held that the Commerce Clause barred the states from enacting laws which intruded too far into the interstate domain. In the very first of these cases - and indeed the first case under the Commerce Clause - Chief Justice Marshall had 'described the federal commerce power with a breadth never yet exceeded.' *Wickard v. Fillburn*, 317 U.S. 111, 120 (1942). His opinion in *Gibbons v. Ogden*, 9 Wheat 1, in 1824, had delcared that the Commerce Clause comprehended 'that commerce, which concerns more states than one...'

"This sweeping interpretation of the clause as reaching all commercial matters affecting the states generally, by a judge who had lived through the period when the Constitution was adopted and even taken some part in that process, finds support both in the usage of language during that period, and in the proceedings in the Constitutional Convention. * * *

"[Although some cases took a restrictive view of Commerce Clause powers] in the great majority of cases decided during the same general period, 1900-1930, the Court was upholding the application of the commerce power even to intrastate transactions. * * *

"The Grain Futures Act, upheld in *Chicago Board of Trade v. Olsen*, 262 U.S. 1 (1923), regulated trading on the grain exchanges, most of which consisted of sales of futures not actually to be delivered and accordingly involving no interstate commerce, although they controlled the price of grain throughout the country. But the Court 'refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such.'

* * *

"The depression had hit farmers as hard as workers and businessmen. Even before 1929 a maladjustment between the demand for and supply of basic agricultural products and resulting low prices to the farmers had prevented farmers from sharing in the temporary prosperity of that period. With the depression, farm prices collapsed to an even greater extent than prices generally. This was of particular significance insofar as it related to the prices of commodities farmers buy. Farm prices dropped so rapidly that by the spring of 1933 the average purchasing power of the farmer in relation to such commodities had decreased 50 percent. The curtailment in domestic demand as a result of a drastic decline in agricultural export had not been accompanied by any equivalent diminution in supply, since the individual farmer would lose by reduction of his crops unless the vast majority of his fellows limited production to the same extent. The problem was obviously unsolvable by state or local action; the crops were produced in many states and competed with each other in national and international markets.

[Early depression farm legislation, relying on the taxing power, was struck down as violative of the Tenth Amendment in *United States v. Butler*, 279 U.S. 1 (1936).]

"The marketing order provisions of the Agricultural Adjustment Act, as improved in 1935, did not fall within the *Butler* case. They permitted the establishment of minimum prices for milk in interstate milk sheds, and a limitation upon the quantity marketed of fruits, vegetables and some miscellaneous commodities. *** The first cases to reach the Supreme Court were suits brought by the United States to compel compliance with the orders in the Boston and New York milk marketing areas. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939); *H. P. Hood & Sons v. United States*, 307 U.S. 588 (1939). ***

"The prices regulated were those in sales by dairy farmers to dealers who received the milk in neighboring country plants and then transported it to market. It was argued that these sales were 'fully completed before any interstate commerce begins.' [*Rock Royal*, at 568.] But the Court, speaking through Mr. Justice Reed, reaffirmed the holding of [*Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); and *Lemke v. Farmer's Grain Co.*, 258 U.S. 50 (1922)] that 'where commodities are bought for use beyond state lines, the sale is a part of interstate commerce.' [*Rock Royal*, at 568-69]. Stern, *The Commerce Clause & the National Economy*, 1933-1946, 59 Harv. L. Rev. 645-688 (1946).

Thus the interpretation of the scope of "interstate commerce", established in *Dahnke* and *Lemke*, was reaffirmed by the Court in this crucial depression case, as well as in other critical decision of that period. See *Currins v. Wallace*, 306 U.S. 1 (1939) (upholding federal regulation of purchases of tobacco in North Carolina warehouses citing *Dahnke*, *Lemke*, *Swift*, *Stafford*, *Flanagan*, *and Shafer*).

The Commerce Clause has two facets: affirmatively, it authorizes national legislation; and negatively, it limits certain state actions found inimicable or burdensome to the workings of the federal free trade unit.

> "What Marshall merely adumbrated in *Gibbons v. Ogden* became central to our whole constitutional scheme: the doctrine that the Commerce Clause, by its own force and without national legislation, puts into the power of the Court to place limits upon state authority. *** Marshall's use of the Commerce Clause greatly furthered the idea that though we are a federation of states we are also a nation, and gave momentum to the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community." Frankfurter, *The Commerce Clause Under Marshall*, Tainey & White, 12-29 (1937).

The negative implications of the Commerce Clause are not to be applied in any absolute way. Automatic application of formulas has long been rejected in favor of a frank assessment of the competing needs of the federal free trade unit, and the needs of the state to exercise its authority over the particular subject in question. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). However, at least since the depression cases, it has been recognized that where Congress has spoken, it has ultimate power to redefine the scope of the Commerce Clause. *Southern Pacific*; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946); *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

> "For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests. *Cooley v. Board of Wardens.*
>
> "*Congress has undoubted power to redefine the distribution of power over interstate commerce.* ***
>
> "But in general congress has left it to the courts to formulate the rules thus interpreting the Commerce Clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn ... Meanwhile, Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system." *Southern Pacific*, at 770. (emphasis added).

In the instant case Congress, and the great majority of states, have accommodated their legislation to well established definitions of the scope of interstate commerce. The states have done so in the Model Business Corporation Act and similar laws. The "interstate commerce" exemption incorporated therein is intended to conform the Model Act to the definitions of "interstate commerce" propounded in *International Text Book Co. v. Pigg*, 217 U.S. 91 (1909); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921); *Union Brokerage v. Jensen*, 322 U.S. 202 (1944); and *Eli Lilly & Company v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1960). Model Business Corporation Act Annotated (2nd Ed. 1971) § 106 2d Par., ¶ 4.05. The definition of interstate commerce established in those cases is the definition relied upon by Allenberg in this appeal.

More to the point, however, is the fact that Congress has exercised its power to define interstate commerce,

and has provided, by legislative statement, definitions of interstate commerce applicable to the transactions in cotton which are the subject of this suit. The definitions provided by Congress are entirely the same as those established in the seminal cases:

> *Dahnke*; *Lemke*; *Pigg*; *Shafer*; *Flanagan*; *Swift & Co.*, and *Stafford*.

These same definitions were later approved in the post depression cases: *Rock Royal*; *H. P. Hood v. U. S.*; and *Currin* cases which also recognized the authority of Congress in defining the scope of the Commerce Clause.

The Commodity Exchange Act, 7 U.S.C. ¶1, et seq. (which, inter alia, established the legislative foundation for the New York Cotton Exchange which is used by Allenberg Cotton Company, Inc., to hedge purchases of cotton from farmers like Appellee) provides, at § 3: "For the purposes of this Act (but not in any wise limiting the foregoing definition [in section 2] of interstate commerce) a transaction in respect to any article [e.g. cotton] shall be considered to be in interstate commerce if such article is part of that current of commerce *usual in the commodities trade* whereby commodities and commodity products and by-products thereof are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description [in Section 2], *all cases where purchase* or sale *is* either *for shipment to another State*, or for manufacture within the State and the shipment outside the State of the products resulting from the manufacture."

This definition should be given great weight in the circumstances of this case. For a commodity merchant, operating its business by hedging on the New York Cotton Exchange, or on the Chicago Board of Trade, both the purchase and the hedging of commodities are interdependent parts of a whole. If either the cash purchase (from the farmer) or the hedge (of "futures" on the exchange) is not valid, the economic function of the two complementary transactions will be entirely defeated. A narrow viewpoint of either side of the transaction, a viewpoint which fails to recognize that both must be valid for the crucial economic function of the "hedge" to survive, is inimicable to the interests of the national free trade unit. Such a viewpoint would strike a mortal blow to the foundations of the nation's commodity marketing system. In 1923 in *Chicago Board of Trade*, the Court was presented with such a viewpoint and resoundingly rejected it.

In *Chicago Board of Trade*, the Grain Futures Act (the precursor of the Commodity Exchange Act) was challenged as exceeding the power of Congress in that it purported to regulate the making of contracts for the purchase and sale of grain for future delivery. The contracts were made and performed wholly in Chicago and were usually settled by offsetting contracts on the exchange, not involving actual delivery. The grain which was the subject of the transactions was not moving, but was stored in public warehouses. Viewed narrowly, those contracts were merely local transactions. However, the Court refused to ignore the actual economic role of the contracts made on the floor of the exchange. It recognized contracts for *future* delivery as a fit subject for the exercise of power under the Commerce Clause, citing as authority *Stafford*, a case upholding the power of Congress to regulate *cash sales* of agricultural commodities. The Court quoted that well known passage of *Stafford*, upholding the Packers and Stockyards Act:

> "The stockyards are but a throat through which the current of commerce flows and the transactions which

occur therein are only incident to this current from the west to the east and from one state to another ... The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensible to its continuity."

This reasoning applies equally here. The sale by the Mississippi farmer is indispensible to commerce in cotton. Its otherwise local aspects are overshadowed by its critical significance as the initiation of interstate commerce in cotton. Relying upon the validity of the contract, the purchaser of the cotton, in the normal course of events, hedges the purchase by an offsetting sale of cotton on the New York Cotton Exchange (see the explanation of this practice in the Statement of the Case at ftns. 9-13) or by offsetting sales made directly with a cotton mill. In both cases the "hedges" established are protected from invalidity by the Commodity Exchange Act §6c (which prohibits entering into, or confirming such sales if they are fictitious. 7 U.S.C. §6c). They are protected by federal law because practice of "hedging" is vital to the nation's economy. The Commodity Exchange Act was a fit subject for the exercise of power under the Commerce Clause because of the vital economic function performed by the national agricultural marketing system.

An enforceable contract between the farmer and an out of state commodity merchant is no less vital to the marketing of the nation's agricultural products. In the eyes of the commodity merchant the validity of the contract with the farmer is fully as important as the validity of the offsetting contract on the commodity exchange. The Congressional definition expresses the understanding of the

trade of a doctrine established at least at the beginning of this century, if not sooner, that a purchase of cotton (or other commodity) for shipment from the state is a purchase in interstate commerce. *Dahnke*, *Lemke*, *Stafford*, *Swift*, *Shafer*, *Flanagan*.

Allenberg does not argue here that such a purchase contract is absolutely immune from state regulation or taxation. It argues only that such a contract may not be ***invalidated*** by a state because it is made without local corporate qualification.

Where local qualification was not accomplished because of reliance upon well established definitions of interstate commerce, definitions established judicially and subsequently incorporated into legislative programs central to the agricultural marketing system, those definitions cannot be abandoned by the State of Mississippi without conflicting with the national marketing system which has been fostered, protected, and established under the Commerce Clause, as interpreted by Congress in the Commodity Exchange Act, and by this Court in its past decisions.

Further evidence of the characterization of such transactions by Congress is given by the recent declaration of policy in the Cotton Research & Promotion Act, 7 U.S.C. §2101 (emphasis added):

"Section 2101. Legislative findings and declaration of policy. — Cotton is the basic natural fiber of the Nation. It is produced by many individual cottongrowers throughout the various cotton-producing States of the Nation. ***Cotton moves in large part in the channels of interstate and foreign commerce and such cotton which does not move in such channels directly burdens or affects interstate commerce in cotton and cotton products. All cotton produced in the United States is in the current***

> *of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton and cotton products.* The efficient production of cotton and *the maintenance and expansion of existing markets* and the development of new or improved markets and uses *is vital to the welfare of cottongrowers and those concerned with marketing, using, and processing cotton as well as the general economy of the Nation.*"

These statements of Congress reflect the realities of the cotton industry. They are entitled to great, if not controlling, weight. *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451 (1962).

As to the deference which should be given Congressional definition of the scope of the Commerce Clause *Prudential Insurance v. Benjamin*, 328 U.S. 408 (1946), is instructive. Prior to the decision of *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944), the Supreme Court had given broad scope to state regulation of the insurance business by a series of cases holding that the insurance business was not "interstate commerce." In *South-Eastern Underwriters*, the Court held that the modern business of insurance was "interstate commerce," and therefore in a category which Congress could regulate, and which could not in some respects be regulated by the states.

After the decision in *South-Eastern Underwriters*, Congress passed the McCannon-Fergeson Act, 59 Stat. 33, 15 U.S.C. § 1011, which stated a congressional policy that regulation and taxation of insurance should be left to the states.

Thereafter, in *Prudential Insurance*, Prudential challenged, on Commerce Clause grounds, the imposition of a South Carolina tax on premiums received from South Carolina residents. The Court sustained the state's power to

tax in an opinion which leaves no doubt of the authority of Congress to establish the contours of the Commerce Clause. The relevant doctrine of that case was more recently restated by Mr. Justice Douglas in *State Board of Insurance*, at 456:

> "The power of Congress to grant protection to interstate commerce against state regulation or taxation, or to withhold it, is so complete that its ideas on policy should prevail."

Where subsequent legislation and industry practice have relied upon the continuing validity of prior decisions, and incorporated their definitions of interstate commerce, the Court should be loath to change them. In such cases the Court need not decide, de novo, whether its prior rules are sound. *State Board of Insurance; Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

In *Flood* the Court listed four reasons for refusing to disturb older precedents of *Toolson* and *Federal Baseball*, 259 U.S. 200 (1922), especially where economic and business relationships had undoubtedly been established on the assumption that the prior decisions would have continuing validity: 1) Congressional awareness for three decades of the Court's prior ruling; 2) the fact the trade relationships were established upon the understanding that the prior decisions would have continuing validity; 3) the negative consequences which would be produced by the retroactive effect of judicial change of the law; 4) a desire that any needed remedy be provided by legislation rather than by court decree. The Court concluded: "We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress by its positive inaction, has allowed those decisions to stand so long and, far beyond

mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." *Flood*, at 283-84.

The same conclusion reached in *Flood* from the application of these four considerations should be reached in this case.

1) Congress has been aware since long before *Dahnke* in 1921, of the general understanding that purchases of commodities made for shipment out of state were deemed "interstate commerce" with the concommitant result that such transactions may not be regulated in some respects by the states. It has incorporated that understanding in the definitions contained in its own legislation. At least since 1921 it has been aware that one limitation on state power over such transactions is that the states will not be allowed to refuse to enforce such contracts in their courts.

2) Commodity merchants, such as Allenberg, have established trade relationships on the assumption that these definitions of interstate commerce, and the concommitant limitation on state power would have continuing validity; i.e. commodity merchants have assumed that they could buy agricultural commodities for interstate shipment without first qualifying to do business in each state in which they buy. They have assumed that the contracts established in such transactions will be enforceable, and they have entered into and hedged many millions of dollars worth of contracts on that assumption.

3) The negative consequences which would stem from the retroactive effect of a judicial change in the law is nowhere better illustrated than in the Mississippi experience of the cotton industry. Over one million bales of cotton in Mississippi were under forward contract in 1973. The decision of the Mississippi Supreme Court in the

instant case was followed by the repudiation of great numbers of these contracts, and the filing of scores of lawsuits in the United States District Courts of Mississippi. The price of cotton in the spring of 1973, when most forward contracts were made, was about $.30 per pound. The decision in the instant case was rendered in May, 1973. By September, 1973 the price had climed to $.85 per pound, and it remained at extremely high levels until March, 1974, after reaching peak levels of over $.90 per pound in December, 1973.

Many cotton merchants who were not qualified to do business in Mississippi were caught in a terrible trap by this decision. The prices they agreed to pay in forward contracts in the spring were based on the prices at which they could then sell that cotton. They had no way of knowing that the price would go up. (If anyone had had this foresight he could have taken a speculative position on the New York Cotton Exchange and "made a killing." He did not need to merchandise cotton). Because they did not know in the spring whether the price of cotton would go up or down they "hedged" the forward contracts by making sales of futures on the New York Cotton Exchange. If the price went down they could buy back the sale of futures (close their futures position) at a profit which would be roughly equal to the amount lost because the price of the cash commodity purchased had declined. However, the price went up. If a merchant had sold futures at $.35 per pound it had to buy back those futures at $.85 per pound, incurring an enormous loss. But if it could not enforce its contract for the cash commodity in Mississippi the merchant had no way to recover the money lost.

This was true whether the New York Cotton Exchange was used as a hedge, or a hedge was established by sales to cotton mills. If the merchant made a forward purchase

contract for $.30, and hedged it by a resale at $.35 to a cotton mill, it was theoretically protected from any price change. It was "out of the market." If the price went up or down it was protected, because it had locked in a margin of $.05 to cover costs and expected profit. But when the Mississippi Supreme Court held that it could not enforce its contracts with the farmer, it faced disaster. In order to deliver on its $.35 contract with the mill it had to buy cotton at $.85. If it defaulted in its contract with the mill it was liable for the same amount because the mill would purchase replacement cotton at $.85 and sue it for the difference between that cost and the contract price.

In fact, as a result of farmer defaults in forward contracts in 1973 many cotton merchants suffered enormous losses. Some were rendered insolvent. Those merchants which had placed heavy reliance on Mississippi forward contracts survived in large part because of the action of the United States District Court for the Northern District of Mississippi. Prior to that Court's decision great numbers of farmers had repudiated forward contracts. In one farming area alone, in September, 1973, farmers repudiated 30 contracts with a single out of state corporation for over 7,000 acres of cotton, expected to produce over 7,000 bales (representing a potential loss of $1,750,000.00). If the United States District Court had ratified the decision of the Mississippi Supreme Court in the instant case, the certain result would have been chaos in the industry and enormous hardship for many cotton merchants and mills who had relied upon the previous state of the law.

Cotton deliveries in Mississippi during the 1973-74 harvest were later than expected in many areas. This may have been due in part to weather, as many farmers claimed, but another reason was a desire to wait and see what the

decision of the United States District Court would be in the first cases raising the qualification issue. That decision was handed down on January 10, 1974 in the companion cases of *Cone Mills Corporation v. Hurdle, et al* and *Allenberg Cotton Company, Inc. v. Coleman*, 369 F. Supp. 426, reprinted in Supplemental Brief of Appellant Containing New Case Authority, p. A. 1 et seq. In those cases preliminary mandatory injunctions were granted ordering the delivery of cotton under forward contracts. Since then the *Allenberg v. Coleman* case has been settled. The case of *Cone Mills Corporation v. Hurdle* still pends, awaiting trial on a docket crowded with other cotton cases.

Few cases demonstrate so vividly the inter-relationship of legal opinion and economic effect, or illustrate so forcefully the soundness of the proposition that the law of "commerce among the States is not a technical legal conception, but [must be] a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375 (1905), Holmes, J., quoted in *Allenberg Cotton Company, Inc. v. Coleman*, 359 F. Supp. 426, and in *Wickard v. Fillburn*, 317 U.S. 111 (1942).

The negative consequences of the retroactive effect of the Mississippi Supreme Court's decision in this case have been postponed by the subsequent decision of the United States District Court for the Northern District of Mississippi. However, many of the cases in which deliveries were made under preliminary mandatory injunction still pend trial or appeal. If this Court affirms the decision of the state supreme court, the severe consequences so far avoided will be incurred by many merchants and mills who relied on the promises of cotton farmers to perform their freely bargained contracts. These cotton merchants and mills are morally blameless, and, prior to the decision of this case, were legally blameless, too.

Aside from the Mississippi situation, if this Court should adopt the ruling of the state court as the supreme law of the land, it would risk creating hardship and severe economic dislocations on a national scale. Other commodities, such as wheat, are commonly purchased by forward contracts. *Small Business Problems Involved in the Marketing of Grain and Other Commodities*, Report of the Subcommittee on Special Small Business Problems of the Permanent Select Committee on Small Business, 93rd Cong., 2d Sess. (House Report No. 93-963, April 1, 1974) p. 7. Doubtless many wheat and grain merchants have entered these contracts without qualifying to do business in the seller's state, relying upon *Dahnke*, *Shafer*, and *Lemke*, all precedents established in the wheat industry. If, by judicial decision, these precedents are suddenly reversed, the adverse consequences suffered in Mississippi in 1973 may be duplicated in other industries in other states.

4) For these reasons the Court in *Flood* expressed its desire that any needed remedy be provided by legislation rather than by court decree. It is the job of the legislative branch to prepare studies and analyses of the consequences of a change in long established precedent. The Court can only speculate on those consequences. But even if this Court were equipped for such an inquiry, the legislative process would still be the proper route. The fact that legislative hearings were occurring and bills were being introduced, would give notice to the buyers of corn, chickens, pork bellies, rice, sugar, and all the various products of our land, that change was in the wind. Then steps could be taken to adjust to that change without the risk of violent economic disruption of established commercial practice.

For this reason this Court need not and should not decide de novo whether *Dahnke* should continue to be the law of the land.

II. B. RECONSIDERATION OF THE *DAHNKE* PRINCIPLE

The rule of *Dahnke*, *Sioux Remedy*, *Pigg*, *Crutcher*, and *Robbins* is that state license or qualification requirements may not be required to make purchases or sales for shipment in interstate commerce without running afoul of the Commerce Clause. The continuing validity of that rule was recently affirmed in *Eli Lilly* where, citing *Crutcher*, *Pigg*, and *Sioux Remedy*, the Supreme Court stated: "It is well established that [a state] cannot require [a foreign corporation] to get a certificate of authority to do business in the state if its participation in this trade is limited to its wholly interstate sales..." *Elu Lilly*, at 278.

But even if the *Dahnke* rule were considered de novo, it should be reaffirmed.

It has been recognized that in a case of this posture "the matters for ultimate determination here are the nature and extent of the burden which the state regulation ... imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make applicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the Commerce Clause from state interference." *Southern Pacific*, at 770-771.

The burdens imposed by the retroactive effect of a judicial reversal of *Dahnke* have already been discussed. But there are also prospective burdens imposed by the holding of the state court in the instant case.

It is a necessary effect of the rule now sought to be applied in Mississippi, that any foreign corporation which might seek to buy commodities in such a state must qualify

even before entering into a purchase contract. To fail to do so is to risk abrogation of the contract at any time after the "ink dries," without the protection of state enforcement of the obligation.

As a practical matter this will mean that potential competitors for the agricultural goods in the state's market must decide *prior to competing* whether to qualify in the given state or not. The anticompetitive effect of excluding potential competition from a given market has long been recognized by this Court. "Potential competition ... may restrain producers from overcharging those to whom they sell or underpaying those from whom they buy..." *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964).

> "The biggest, most important service the cotton marketing system can render cotton growers is to make prices paid to farmers in local communities and regions true guides in direction of production. This means the varieties of cotton best suited to a region will and should sell at relatively the highest price, and other cottons, whether longer or shorter in staple, will sell at relatively lower prices." *Cotton — Demand, Supply & Merchandising*, p. 5-10 quoted at ftn. 16, Statement of the Case.

This service can only be performed if the market in a given state is fully open to all potential competitors, not just those who have previously entrenched themselves.

The national market for cotton which exists today is intensely competitive. 1968 U.S. Code Cong. & Admn. News 1869-70. It is made up of many small companies using modern communications and transportation to buy cotton in every producing state to resell it all over the world. No giants dominate the industry. The capital required, relative to the value of the commodity bought and

sold, is extremely low. About 500 small firms marketed between 70 and 80% of the nation's $2.75 billion cotton crop last year, more than half of which was sold abroad. See Statement of the Case at ftns. 17 and 31. Because these companies are small, administrative burdens are a very real factor in determining areas of competition. Today small companies located in the Carolina often purchase cotton in Arizona, Mississippi, Missouri, California, or other far away states in competition with firms in Dallas, Lubbock or elsewhere. They are drawn into the market in a given state by local brokers, such as Mr. Covington in the instant case. These local brokers know the farmers in their area, the varieties of cotton produced locally, and the potential buyers for that cotton. If prices offered by some firms in the local market get out of line, the local broker can raise the level of competition by contacting another firm with a telephone call. In this manner a firm which might not normally compete in Marks, Mississippi, might suddenly be drawn into that market.

However, if the ruling of the Mississippi Supreme Court is allowed to stand, no cotton merchant which has not previously qualified in Mississippi will even bid there. For if its bid is accepted and a contract made, it must instantaneously hedge that contract by offsetting sale to a mill or on the New York Cotton Exchange. Having thus put itself on the line, the merchant, under Mississippi law, will be completely at the farmer's mercy. If the market goes down, the farmer can enforce the contract against him. If the market goes up, the merchant cannot enforce the contract against the farmer.

It will result from this state of affairs that the firms already entrenched in Mississippi will qualify to do business there, and will bid for Mississippi cotton free from competition by others who might potentially be interested.

Mississippi will become a separate marketing area, a result completely at variance with the goal of the authors of the Constitution of a national common market.

If the Supreme Court adopts the rule promulgated by the State of Mississippi as the law of the land, similar results will be produced in other states in markets for other commodities.

The *Dahnke* rule is sound in another basic aspect. *Dahnke* states a rule which allows the buyer to judge the legal effect of its action from the nature of the transaction, not from its size. The *Dahnke* rule represents a great advance from a rule applied on a quantum basis. A quantum rule requires the buyer to guess when the size of its purchase or purchases may change its legal effect. A single contract might be made with a large farmer for the purchase of his production on 2,000 acres, estimated to produce 3,000 bales of cotton. At a price of 60¢ per pound the value of goods sold is $900,000.00. Is this intrastate business? On the other hand most cotton farms are very small. Another merchant might make 15 contracts to buy an aggregate of only 600 acres of cotton. Is this intrastate business?

The importance of continued adherence to well established rules, especially in a commercial setting, was recently reaffirmed by the Supreme Court in *Kosydar v. National Cash Register Co.*, 42 Law Week 4767 (1974). In *Kosydar* the court refused to depart from the basic principle of *Coe v. Errol*, 116 U.S. 517, and found it of great importance that "This Court has adhered to that principle in the almost 90 years since *Coe* was decided..." As Mr. Justice Stewart pointed out in the opinion, it is highly important that the parties involved be able to determine the legal effects of their actions through a clearly defined rule.

There are three alternative rules which might be proposed by Appellant-Pittman.

The first would interpret *Dahnke* to mean that a purchase of commodities is only "interstate commerce" where the contract calls for delivery on board a common carrier. If this rule is accepted, virtually no purchase of cotton would ever be interstate commerce. (See p. 71 of this Brief.) In fact, all purchases which are consummated by delivery of warehouse receipts would be intrastate commerce, thus excluding from interstate commerce contracts to purchase most of the nation's agricultural goods, e.g.: cotton, wool, corn, wheat, tobacco, flaxseed, etc. In addition to the other problems produced by such a rule, it would produce a result completely at variance with *Currin*, *Chicago Board of Trade*, *Shafer*, and with the United States Warehouse Act, 7 U.S.C. §241 et seq. See *Girand v. Kimbell Milling Co.*, 116 F.2d 999 (5th Cir. 1940).

The second possible rule is a quantum rule. It accepts *Dahnke*, but would apply the Constitutional exemption only to foreign corporations who had not done "too much" buying in the state. The adoption of such a rule would mean abandonment of a well established, clearly defined rule in favor of one which was completely ambiguous.

The third possible rule would be to abandon *Dahnke*, and require foreign corporations which wish to purchase commodities for shipment out of state to qualify. Such a rule would be absolutely at variance with the intent of the Constitution and the principles established in numerous decisions of the Court, would make each state a separate marketing area, would diminish competition for commodities, and its retroactive adoption by judicial decision would risk creating unforseen hardships for honest buyers and windfall profits for dishonest sellers.

Against the negative results of an abandonment of *Dahnke*, what interest of the state of Mississippi would be served? In *H.P. Hood & Son, Inc. v. DuMond*, the protection of the national free trade area was considered more important than the interest of the State of New York in regulating local production and distribution of milk, even though the Court found that the state regulation was intimately related to public health and welfare, and that the economy of the local industry required economic controls.

The interest of a state which is served by the prohibition of use of the courts by a foreign corporation is said to be the protection of the state's citizens from lack of redress in local courts against foreign corporations. Note, *Foreign Corporations - State Boundaries for National Business*, 59 Yale L. J. 737, 743 (1959): "The statutes attempt to insure availability of a person on whom valid process may be served, by requiring designation of an agent expressly authorized to receive it." However, in this respect the statute is superfluous because today every state provides for service of process under long-arm statutes. Note, *Foreign Corporations - State Boundaries for National Business*, id. at 738.

The Court has long recognized that a foreign corporation may be served with process in connection with activities which are insufficient to require it to qualify in the State. *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914).

The local defendant who is sued by a foreign corporation is, of course, not the person whom the qualification requirement is designed to protect. Yet the only party benefited by the statute is a wrongdoer who has repudiated his contractual promises when conditions have caused it to be to his selfish advantage to do so. Reliance on a foreign corporation's failure to qualify has been called an "immoral

defense." Whyte, *Business Associations*, 1938 Wis. L. Rev. 52, 54.

The Mississippi prohibition of a non-qualifying foreign corporation from the use of its courts was before the Supreme Court in *Woods*. In that case the Mississippi prohibition was held to apply in federal courts in diversity actions. In *Woods* the Court was unsure whether to interpret the Mississippi statutes in such a way as to prohibit entirely the use of all courts. However, the majority decided it should be so interpreted. In a ringing dissent, joined by Justices Rutledge and Burton, Mr. Justice Jackson stated his feelings about the character of the Mississippi law, as interpreted to bar all legal redress:

> "The state statute as now interpreted by this Court is a harsh, capricious and vindictive measure. It either refuses to entertain a cause of action...or it holds it invalid...In either case the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which sustained the injury, but results in unjust enrichment of the debtor, who has suffered no injury from the creditor's default in qualification..." *Woods*, at 534-40.

Other commentators have agreed with Mr. Justice Jackson:

> "Whatever its value as a punitive device, this penalty does not serve to rectify the harm done by non-registration. The state's interest in registration lies in the receipt of taxes and the protection of its citizens against irresponsible acts. To deny a noncomplying firm the right to enforce its claims does not satisfy either of these interests, but instead confers a windfall on the person against whom the claim would be outstanding. Even

considered as a deterrent rather than a remedial expedient, unenforceability of contracts is a crude and erratic punishment. Many offenders may be able to collect their claims without resort to legal action. Suit may be possible in another jurisdiction. ***And the firm which acts on a bona fide belief that it is not transacting such business as to bring it within a registration statute may be under the same disability as a wilful violator.*** if such provisions are desirable at all, it seems clear that room should be left for the courts to make exceptions." Note, *Foreign Corporations - State Boundaries for National Business*, supra at 746 (emphasis added).

Such then is the character of the state interest which is balanced against the negative effects of a departure from *Dahnke*.

In the cases which have upheld state regulation over a claim of burdensome effect on national interests, the Court has either determined that the state interest was very significant and that the state regulation was specifically designed to correct a real problem of legitimate local concern, or has concluded there was little, if any, detrimental effect to the federal common market.

The later case is illustrated by *Union Brokerage v. Jensen*, 322 U.S. 202 (1944) where the Court found that the business had established local offices and local operations like any other. The imposition of the qualification requirement on such operations had no real effect on interstate trade. Similar analysis also applies to *Eli Lilly* where the foreign corporation had established a local office and substantial intrastate activity and it was required to qualify. No negative effect on its interstate transactions, which the Court

found were "entirely separable" from the intrastate aspects of its business, would result from the decision.

In *Parker v. Brown*, 317 U.S. 341, 363-368 (1943), the Court not only found problems of a significant and specific state concern, it also found no conflict with the Commerce Clause where Congressional action in the field dovetailed with that of the state. "Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action... * * * The history of the industry at least since 1929 is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers. It is significant of the relation of the local interest in maintaining this program to the national interest that ... the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the State. * * * ... The Secretary of Agriculture..., instead of establishing a federal program has, as the [Agricultural Adjustment Act of 1938, 52 Stat. 31] authorizes, cooperated in promoting the state program and aided it by substantial federal loans. Hence we can not say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy... [Nor does it] impair national control over the commerce in a manner or degree forbidden by the Constitution."

The Mississippi law falls far short of the affirmative requirements established in cases upholding state in-

trusions into interstate commerce. It is not consistent with the central principle of ***Dahnke***, ***Lemke***, ***Swift & Co.***, ***Hood***, and others, that a sale for shipment out of state is interstate commerce. It was not specifically designed to correct a significant problem of real local concern. To the contrary, it has been deemed "immoral" and "capricious," and it will reduce competition for the crops of Mississippi farmers. It does not dovetail with Congressional action, nor has it been approved by federal legislation. In fact, by discouraging the practice of forward contracting in Mississippi, it strikes at the cornerstone of the new programs of the Department of Agriculture established pursuant to P.L. 91-524 and P.L. 93-86 (see materials at ftns. 22-45, Statement of the Case).

In ***Pike v. Bruce Church***, 397 U.S. 137, 142 (1970), the Court emphasized another portion of the test for determining the validity of the state action: "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on ***whether it could be promoted as well with a lesser impact on interstate activities***." (Emphasis added.)

Assuming that a legitimate local purpose is found in the Mississippi desire that all foreign corporations qualify if any business is transacted in Mississippi, that interest does not require an absolute prohibition from enforcement of contracts.

Most other states have not found the absolute prohibition to be necessary and have provided that a corporation may remove the disability from use of the courts by subsequently qualifying in the state. For example, the Model Business Corporation Act, prepared by the Committee on Corporate Laws of the American Bar Association, provides, at §124: "No foreign corporation transacting business in this State

without a certificate of authority shall be permitted to maintain any action, suit or proceeding in any Court of this State, ***until such corporation shall have obtained a certificate of authority***." (Emphasis added.) (When Mississippi enacted the Model Business Corporation Act the emphasized words were intentionally left out of the statute. ***Parker v. Lin-Co. Producing Co.***, 197 So. 2d 228 (Miss. 1967).)

A recent study lists 42 states in which the statutory bar to enforcement is removed by subsequent qualification, and 5 states (Alabama, Arizona, Arkansas, Mississippi and Vermont) where such contract may not be enforced even after qualification. C. T. Corporation, ***What Constitutes Doing Business*** (1973) p. 6. (The status of the law in the other three states is apparently in doubt.)

Certainly allowing cure of the disability would promote any 'legitimate state interest with a lesser impact upon interstate activities.' Therefore, the Mississippi enforcement bar also fails to meet the test of ***Pike v. Bruce Church***.

CONCLUSION

Allenberg Cotton Company, Inc., has not been guilty of fraud, bad faith, immoral or illegal conduct. On the contrary, in January 1971 it entered into this and other freely bargained contracts to buy cotton for delivery in the fall and winter of 1971, and contemporaneously entered resale contracts. The price agreed between the parties, like the price of the offsetting sales, was based on the cotton market at the time of entering the contract. There was immediate and direct reliance by Allenberg upon the validity of the contract, and upon the continuing validity of long-standing principles of law. Those principles have been incorporated into federal and state statutory provisions, and into trade and commercial relationships and patterns.

Their abandonment would be deleterious to current federal farm programs, risk commercial upheaval on a substantial scale, inflict decided hardship on cotton merchants currently seeking to enforce 1973 forward contracts in Mississippi, Arkansas, and Alabama, reduce competition, and would produce windfall rewards for the immoral conduct of numerous selfishly motivated repudiators of solemn contractual promises. The legitimate interests of the State of Mississippi could be equally well served by other devices with a lesser impact on interstate activities, and do not require the implementation of the present "harsh, vindictive, and capricious" law by this Court.

For these reasons, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

JOHN McQUISTON, II
1400 Commerce Title Building
Memphis, Tennessee 38103

Attorney for Appellant

Goodman, Glazer, Strauch & Schneider

Of Counsel